

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2484

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To be argued by
BARBARA JONES AMBLER

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 74-2484

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK BRASCO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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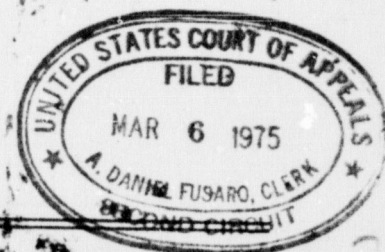




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**United States Court of Appeals
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Docket No. 74-2484

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK BRASCO,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Frank Brasco appeals from a judgment of conviction entered on October 21, 1974, in the United States District Court for the Southern District of New York, after a four week trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Indictment 73 Cr. 985, filed on October 23, 1973, named as defendants Frank Brasco, a Member of the House of Representatives of the United States Congress, and Joseph Brasco, Frank Brasco's uncle (A. 9).*

* "A." refers to appellant's appendix, "Br." refers to appellant's brief, "Tr." refers to the trial transcript of the re-trial (J. Cannella), "F. Tr." refers to the transcript of the first trial (J. Wyatt), "P. Tr." refers to the transcript of the post trial hearing (J. Cannella).

The single-count indictment charged the Brascos with conspiracy to defraud the United States (18 U.S.C. § 371), to receive bribes (18 U.S.C. §201), to violate the statutory prohibition against conflicts of interest by Congressmen (18 U.S.C. § 203), and to violate the mail fraud statute (18 U.S.C. § 1341) in violation of Title 18, United States Code, Section 371.

On February 19, 1974, the case against both defendants went to trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury. On March 4, 1974, Judge Wyatt declared a mistrial and granted a severance to Joseph Brasco after the latter suffered what was apparently a mild stroke (A. 3, F. Tr. 1412). On March 19, 1974 after the jury was unable to agree upon a verdict, Judge Wyatt declared a mistrial as to Frank Brasco.

On June 19, 1974, the case having been reassigned to Judge Cannella and Joseph Brasco having become once more too ill to stand trial, (A. 5) the Government proceeded to trial against Frank Brasco. On July 19, 1974, the jury returned a guilty verdict.

On October 19 and 21, 1974 the District Court held a hearing on a motion by Frank Brasco for a new trial, based upon alleged improprieties by the jury during its sequestration. Judge Cannella denied the motion and, on October 21, sentenced Brasco to three months in jail, 57 months probation, and a \$10,000 fine. Brasco remains at liberty on his own recognizance pending the outcome of this appeal (P. Tr. 421-422).

Statement of Facts

The Government's Case

1. Introduction

The Government's evidence established that between June, 1967 and November, 1968, the defendant Frank Brasco, then as at the time of trial * a Congressman, from Brooklyn, New York, was the principal figure in a conspiracy to defraud the United States, by means of bribery, fraud and influence peddling, in order to help a racketeer named John Masiello secure and retain valuable contracts with the United States Post Office Department for the hauling of mail.

The conspiracy had three distinct phases. In June, 1967, Masiello, who had been leasing trucks to the Post Office since 1959 through A.N.R. Leasing Corp. (hereinafter "A.N.R.") and other predecessor companies which he controlled, entered a bid which turned out to be seventh from lowest on a new competitively bid contract to lease trucks to the Post Office in New York City and on Long Island. Through the efforts of Frank Brasco's uncle, Joseph Brasco, whom Masiello had known casually for many years, Masiello met with Frank Brasco in Washington and explained his problem. Thereafter Frank Brasco, who was a Member of the House Post Office and Civil Service Committee, undertook to put pressure upon Joseph Doherty, an official in the Post Office Department in Washington, D.C., to save the contract for Masiello. Between June and December of 1967, at the repeated instance of Frank Brasco, Doherty arranged for the disqualification of all bids on the contract, thus allowing Masiello to rebid; advised Masiello how much to bid when the contract was reopened for secret bids in

* Brasco represented the 11th Congressional District (Tr. 2211).

the fall of 1967; and, finally, assisted in arranging for the disqualification of A.N.R.'s only competition upon the re-bidding, which resulted in the award of the contract to A.N.R. in December, 1967.

The second phase of the conspiracy, from January, 1968 through May, 1968, involved efforts by Frank Brasco to obtain for Masiello an \$875,000 loan with which to finance the purchase of trucks needed to service the new Post Office contract. During this phase, Frank Brasco, Joseph Doherty and Joseph Weiner, a mortgage broker brought in by Doherty and Frank Brasco to find a lender, agreed secretly that a portion of the fee to be paid by Masiello to Joseph Weiner for finding a loan would be delivered, in cash, to Joseph Brasco, for the benefit of Frank Brasco. The loan never went through, and so this money was never paid. In May, 1968, however, Joseph Brasco requested of and received from Masiello \$10,000 in cash, to be sent, as Joseph Brasco put it, "down below".

In the spring of 1968, Timothy May, General Counsel of the Post Office Department in Washington, opened an investigation to explore allegations that Masiello was a member of organized crime. On May 31, 1968, acting on information developed in this investigation, the Post Office refused to renew A.N.R.'s contract. In the final phase of the conspiracy, from June to November, 1968, Frank Brasco first attempted to change this decision by making false statements to Timothy May and other Postal officials about Masiello and his companies. Then, when that effort failed, Brasco schemed to assist Masiello in obtaining further contracts with the Post Office through other companies which Masiello in fact controlled but which were intended by Masiello, Brasco and Doherty to appear to the Post Office to be independently owned and operated.

From July through late October, 1968, Masiello was able to lease trucks to the Post Office through Randen Trucking

Corporation, another firm which he controlled. The Post Office Department discovered Masiello's control of Randen, and denied Randen a formal lease in late October, 1968. Undaunted, Masiello entered a bid under yet another name, T.A.B. Trucking. At a meeting in mid-November, 1968, Joseph Doherty and Frank Brasco agreed that it would be madness to continue to help Masiello, and the conspiracy ended.

The Government's principal evidence at the trial was the testimony of John Masiello, Joseph Doherty, Joseph Weiner and four former Post Office officials. These four officials, including Timothy May, were in no way involved in the criminal scheme but were men with whom Frank Brasco had dealt directly on Masiello's behalf. The testimony of the Government's witnesses was corroborated by abundant documentary evidence.

2. The first phase—June to December 1967: Obtaining the contract for Masiello.

a. After bidding high on a Post Office contract, Masiello asked Ralph Ferraro and Joseph Brasco for help.

In the spring of 1967 John Masiello owned and controlled A.N.R. Leasing Corporation, a truck leasing firm located on 149th Street in the Bronx, New York (Tr. 1105-1106).^{*} Having been convicted and imprisoned in 1956

^{*} Masiello testified as the Government's first witness at the first trial. Masiello refused to testify at the second trial and the trial court permitted the Government to read Masiello's first trial testimony to the jury (Tr. 1089-90). As a result of his refusal, Masiello was charged with and pleaded guilty to criminal contempt, for which he received a sentence of one year and one day pursuant to Title 18, U.S.C. Sec. 4208(a)(2), to run concurrently with the sentences referred to in the footnote below.

on a federal felony charge*, Masiello was not carried on A.N.R.'s books as either an owner or an officer (Tr. 1105).

Since 1959 A.N.R. and predecessor companies controlled by Masiello had been leasing trucks not only to private companies, but also to the Post Office at its 34th Street garage in Manhattan (Tr. 1108, 1110). Masiello was personally acquainted with Isadore Kihl, the garage superintendent, and Andrew Daly, one of the garage supervisors, and had from time to time made cash and other payoffs to them in return for favored treatment for A.N.R. (Tr. 1650, 1837-8, 1874).

On May 1, 1967 the New York City Postmaster issued an invitation for sealed bids on a large new annual contract (Contract 67-67) to lease tractors** for mail hauling in both New York City and Long Island (GX 2; Tr. 1111). A.N.R. entered a bid to supply thirty-five tractors at \$22.00 per day and 22¢ per mile a piece (GX 2). When the bids were opened on June 5, 1967, six firms had submitted bids lower than A.N.R., and Masiello was informed by Kihl or Daly that it would be "pretty difficult" for A.N.R. to continue to do business with the Post Office (GX 29; Tr. 1128).

* Masiello's other convictions and sentences were as follows: In 1970 he was convicted of bribery of New York City Post Office officials, for which he received a five year sentence; in 1970 he also pled guilty to: bribery of an Internal Revenue Service Agent, and received two years consecutive; false statements to a draft board concerning his son's Selective Service obligation, and received three years concurrent with the seven on the bribery cases; and failure to file federal tax returns, one year concurrent with the seven on the bribery cases. Masiello started serving his sentence on these convictions early in 1972. In 1973, Masiello pleaded guilty to a federal extortion charge for which he received a four year concurrent sentence (Tr. 1101-1102). On March 29, 1974, between the first and second trials, Masiello pleaded guilty to a bankruptcy fraud charge, for which he received a one year concurrent sentence (Tr. 1305-6). All of these sentences are pursuant to the provisions of Title 18, U.S.C. Sec. 4208(a) (2).

** A tractor is the front end of a tractor-trailer combination. A.N.R. did not lease the trailers (Tr. 1110, 1254).

Shortly thereafter Masiello met at A.N.R. with a long time acquaintance named Ralph Ferraro (Tr. 1128-29).^{*} Masiello explained his predicament to Ferraro, and Ferraro arranged for Masiello to meet with Joseph Brasco, whom Masiello had known through Ferraro off and on for about twelve years (Tr. 1129, 1132-33). At a meeting in June, 1967 between Masiello, Joseph Brasco and Ralph Ferraro at Joseph Brasco's apartment in Brooklyn, New York, Joseph Brasco assured Masiello that he would arrange a meeting for Masiello with his nephew Frank Brasco (Tr. 1132, 1134).

Within a week to ten days Ferraro called Masiello and told him an appointment had been arranged for him with Frank Brasco in Washington.

b. At Frank Brasco's request, Joseph Doherty arranges for all the bids to be disqualified, so that A.N.R. may bid again.

On a weekday morning in late June, 1967, Masiello and Peter Ferraro, who was Ralph Ferraro's son and also an employee at A.N.R., flew to Washington and met with Frank Brasco at Brasco's Congressional Office on Capitol Hill (Tr. 1136-37).^{**} Brasco was then six months into his first

^{*} Ferraro, who was named as a co-conspirator by the Government in its Bill of Particulars, died in March of 1973 (Tr. 871).

^{**} Peter Ferraro was called as a witness by the Government at both trials. At the first trial, Ferraro testified that he flew to Washington with Masiello during the "summer months" of 1967, went with Masiello to an office which had Frank Brasco's name on the door, and waited in a reception area while Masiello attended a meeting inside (F. Tr. 641-43). At the second trial, Ferraro, who had known Joseph Brasco all his life, changed his testimony, answering "I don't know. I don't remember", when asked to whose office he and Masiello had gone (Tr. 887). Confronted with his testimony at the first trial, Ferraro first claimed that the prosecution had "kept on mentioning Brasco's name time and time again" and had threatened him with perjury charges during inter-

[Footnote continued on following page]

term as a Representative from a Brooklyn Congressional District, and had been assigned to the Post Office and Civil Service Committee (Tr. 2214).

Masiello explained to Frank Brasco that:

"I had been working for the Post Office quite a numerous [sic] years, and we always gave them good service and gave them new trucks, and that we had lost the contract on account of being high bidder, and if there is anything that could possibly be done."
(Tr. 1139)

Although the office of the New York City Postmaster had initial authority to recommend the award of a truck leasing contract to the lowest qualified bidder, subject to review by the Regional Counsel's office, authority for final approval of any contract exceeding \$125,000 lay with the Bureau of Facilities in Washington (Tr. 148-49; GX 29-1). While Masiello waited, Brasco telephoned Michael Sullivan*, who

views before the first trial, and then maintained upon further questioning that he was still sure that the name Brasco was on the door and was simply uncertain whether it was preceded by "Mr." or "Congressman" (Tr. 855-934)!

As indicated in text below, not only Masiello but also Doherty testified to the June 1967 meeting with Frank Brasco in Washington which Masiello said had been attended by Peter Ferraro. Doherty, however, testified that his recollection was that Masiello was accompanied at this meeting by his son, John Masiello, Jr. (Tr. 125). Perhaps resolving this conflict, Peter Ferraro said, under questioning by Judge Cannella, that in 1967 Ferraro and John Masiello, Jr. were the same height, weight and build and were "so close we looked like brothers" (Tr. 933). As indicated below, Frank Brasco denied that he ever met John Masiello, let alone John Masiello, Jr. or Peter Ferraro, at his Capitol Hill office (Tr. 2443, 2357-8, 2384, 2437, 2439 and 2325).

* Sullivan, who was named by the Government as a co-conspirator in its Bill of Particulars, died in the fall of 1973 (Tr. 119).

was Assistant to the Executive Assistant to the Postmaster General (Tr. 119) and Joseph Doherty, who was Executive Assistant to the Assistant Postmaster General for the Bureau of Facilities (Tr. 115), and invited them to the meeting (Tr. 1140; 122).

On the way to Brasco's office, Sullivan told Doherty that they were to meet a contractor who was about to lose a Post Office contract in New York, and that Brasco wanted their help and wanted "to look good" in front of the contractor (Tr. 123).*

When Doherty and Sullivan arrived at Frank Brasco's office, Masiello explained his problem to them and discussed some of the details of his situation with the Post Office. To corroborate Masiello and Doherty's testimony about the meeting (which Frank Brasco denied ever took place**), the Government offered in evidence two pages of notes in Joseph Doherty's handwriting which bore at the top the printed legend "From the Desk of FRANK J. BRASCO, M.C." (GX 28A and 28B). Among other things, the notes contained the name of the firm which was low bidder at the June 1967 bidding, the name "Kahl", which appears to be a misspelling of Isidore Kihl's name, and the words "Check Letter of Amendment." On June 12, 1967, one week after the bids were opened, Masiello hand submitted a letter to the New York Post Office seeking to amend his bid with a lower rate (GX 3).

Doherty testified that he made the notes at Brasco's desk while the meeting with Brasco, Masiello and Sullivan took place, turned them over after the meeting to a Postal official in the Bureau of Facilities, and never saw them again until

* Either enroute to Brasco's office or after meeting with him and Masiello, Sullivan told Doherty that he had already spoken with Joseph Brasco in New York about Masiello's problem with the Post Office contract (Tr. 138).

** See F.n. *supra*, pp. 7-8.

shortly before the first trial (Tr. 127-28). Doherty resigned from the Post Office in June, 1968. A Postal Inspector testified that he found the notes in the Bureau of Facilities' file on A.N.R. in the fall of 1973*.

Before Masiello left the meeting, he was assured by Doherty that Doherty would communicate with him after looking into the problem (Tr. 1142-43, 136).** After Masiello left, Brasco told Doherty and Sullivan that "if anything could be done to help him [Masiello], he would certainly like to help him". Doherty, whose only previous contact with Brasco had been several social meetings, assured Brasco that he and Sullivan "would do anything [they] could" (Tr. 137).

That same day, Doherty related his meeting with Brasco and Masiello to Seth Brewer, an official in the Procurement Division of the Bureau of Facilities. Doherty told Brewer of Brasco's interest in helping A.N.R. and asked Brewer to see what could be done, starting with the possibility that consideration of A.N.R.'s Letter of Amendment might save the contract for Masiello (Tr. 141-42)***. Almost immedi-

* Frank Brasco was able to offer no explanation for how Doherty made these notes if not at a meeting with Masiello in Brasco's office (Tr. 2441, 2325), and relied in summation upon the lame contention that Doherty had "taken" the memo slips from Brasco (Tr. 3125), thus presumably requiring the jury to conclude that Doherty at some point walked away with some of Brasco's notepaper and then later, by rare coincidence, happened to have the notepaper handy to jot down notes of some conversation with Masiello at which Brasco was not present.

** According to Doherty, Frank Brasco was with Masiello, Doherty and Sullivan throughout the meeting (Tr. 136). According to Masiello, Frank Brasco left his office while Masiello was explaining the problem to Doherty and Sullivan, and then returned (Tr. 1141).

*** Brewer testified at the first trial as a defense witness (Tr. 194). Although both sides had communicated with him about the possibility of testifying at the second trial, neither side called him (Tr. 543-544).

ately, Brewer reported back that A.N.R.'s Letter of Amendment, received after the bids were opened, could not be considered (Tr. 143). Doherty gave this information to Brasco by telephone, and assured Brasco that he would "look into the matter further" and report any developments (Tr. 143).

On July 28, 1967, the Post Office file on Contract 67-67 was forwarded in the normal course from New York to Seth Brewer at the Bureau of Facilities in Washington (GX 29-1). The New York City Postmaster (GX 29), the appropriate regional official (GX 29), and the Regional Counsel (GX 101) had all recommended that the award should go to the low bidder, a Brooklyn firm named E. G. Maintenance Corporation.

In early August, Brewer showed the file to Doherty, and told him that E. G. Maintenance was the "recommended low bidder". Doherty asked Brewer to inquire further into E. G.'s qualifications, and shortly thereafter Brewer showed Doherty an August 3, 1967 Telex report he had received from the Regional Office in New York indicating that E. G. had been investigated and found qualified (GX 29-A). Brewer told Doherty "we will have to make the award to E. G." (Tr. 156-57). That same day Doherty telephoned Frank Brasco:

"I told him that we had received a recommendation from New York to make the award to E. G., we checked into the capabilities performing under the contract and that they, on check, they did have the ability to perform and therefore we were going to have to make the award to E. G. Maintenance. I told him I was sorry. That was it." (Tr. 157).

Soon thereafter, Sullivan called Doherty to say that Brasco had called Sullivan, was "quite upset" that E. G. was to get the contract, and wanted to know if "anything else could be done for A.N.R. (Tr. 158). Doherty promised to

try and reported to Brewer his conversation with Sullivan. Brewer told Doherty he would "look into it to see if there was any technicality or ambiguity or some reason that he could maybe get it to the stage where we could readvertise" (Tr. 160). Either the same day or the next day, Brewer reported that he had personally reviewed the bidding papers and that he would seek the opinion of the Post Office General Counsel's office on a possible ambiguity he had discovered in the original solicitation for bids (Tr. 160).

On August 7, 1967, Assistant General Counsel Jack DiLorenzo wrote to Brewer expressing the opinion that the written bid solicitations called for bids of a flat daily rate per truck, and that only two of the bidders (neither A.N.R. nor E. G. Maintenance) were eligible, the other eight having submitted bids combining a flat daily rate plus a rate for mileage actually run. The letter concluded:

"If, however, it turns out that some of these bidders were in fact informed that bids could be submitted on a combination of daily rate and mileage and some were informed that the estimated daily mileage was 70, then we believe that the Department would be required to reject all bids as the bidders were not placed on equal footing." (DXGB, Tr. 2025).*

Brewer informed Doherty that the letter would enable him to inform the New York Regional Office to disqualify *all* the bids and readvertise, and he did precisely that (Tr. 170)**.

* The Government offered the letter in its case through Doherty as GX 30, but the District Court declined to receive it until DiLorenzo himself was on the stand as a defense witness (Tr. 166; 2025).

** Although Brewer did not testify at the second trial, the fact that he notified Doherty very soon after receiving DiLorenzo's letter that all bids would be thrown out strongly suggested (as Brewer had conceded at the first trial) that he never conducted the factual inquiry called for in the last paragraph of DiLorenzo's opinion letter, and instead simply threw out *all* the bids.

Doherty then told Michael Sullivan that he could pass on to Frank Brasco that all bids were being rejected and A.N.R. would be able to bid again (Tr. 170). A day or two later Sullivan told Doherty that "the Congressman was pleased", and wanted to know if Doherty would continue to help A.N.R. on the new advertisement for bids. Doherty told Sullivan "we would do what we could" (Tr. 170-77).

c. Frank Brasco and Doherty coached Masiello on what bid he should submit.

In September, 1967, Masiello telephoned Doherty to ask Doherty whether he could enter a bid of \$40-42 a day per truck. Doherty told Masiello he would not "stand much of a chance" with such a high bid (Tr. 173). Doherty reported the conversation to Frank Brasco, and advised Brasco that "there was no way we could help" [Masiello] unless he entered a "competitive" bid. Brasco asked Doherty to go to New York to explain this to Masiello in person, and Doherty agreed to do so (Tr. 174).

On a Saturday morning in September 1967*, Frank Brasco, Masiello and Doherty met in Brasco's Brooklyn storefront office. Doherty explained again that a bid in the \$40 range was too high, and Masiello said he couldn't make money if he went as low as the low bidders on the previous contract. According to Masiello, Doherty pressed him to go as low as \$33 per day (Tr. 1148); according to Doherty, Masiello said he might be able to bid \$35 per day, Doherty agreed that would be "more competitive" and in a later telephone conversation recommended that Masiello lower the figure to "\$32 or \$33" per day. In any event, Doherty assured Masiello that if A.N.R. won the award and had difficulty breaking even, A.N.R. might be helped by the

* Masiello placed the meeting in "late August", 1967 (Tr. 1146). Both Masiello and Doherty recalled that one of the A.N.R. officers, Thomas McKeever, was also present (Tr. 1146, 175).

Post Office with mileage or fuel allotments (Tr. 1146; 176)*.

Frank Brasco's Capitol Hill office telephone bills showed calls to Masiello's home in Yonkers on October 3, 1967 and to A.N.R. Leasing on October 4, 1967 (GX 91)**. On October 10, 1967, Masiello caused A.N.R. to enter a bid of \$33 per day on the new advertisement (GX 4).

When Ralph Ferraro first undertook to get Masiello together with Joseph Brasco after A.N.R.'s high bid in June, 1967, Masiello suggested to Ferraro that if "something could have been done" to get A.N.R. the contract, Masiello would "consider partnership" with Ferraro (Tr. 1130). In October, 1967 Masiello, Ralph Ferraro and Joseph Brasco met in Joseph Brasco's Brooklyn apartment to discuss the subject further. Masiello told them that the Post Office contract would be profitable if A.N.R. were to "get the results of the mileage or the fuel, either one." Masiello said he would start buying trucks for the contract soon, and the three agreed to be partners on the Post Office contract (Tr. 1152).

* According to Masiello, Frank Brasco was with him and Doherty for about half of the entire meeting, and spent the rest of the time on the phone or with others in his office (Tr. 1149). After the meeting with Brasco, Masiello offered to get Doherty a Cadillac at a bargain rate (Tr. 1150, 177). Doherty declined, but Masiello recalled that Doherty then "very lightly went over the subject of . . . campaign contributions." (Tr. 1150).

** Masiello testified that he had spoken with Frank Brasco by telephone during the fall of 1967 concerning the A.N.R. contract, but could not recall the substance of the calls. Frank Brasco's Washington office telephone records had been subpoenaed by the Government from the Clerk of the House of Representatives before the first trial. Under the terms of an order entered by Judge Wyatt, the Government did not have access to all of the telephone bills for the year in question, but only to entries showing calls to certain numbers found relevant by the District Court (Tr. 1197).

d. Frank Brasco and Doherty enabled Masiello to get the contract by eliminating the low bidder.

When the bids were opened on the new advertisement on October 19, 1967, Masiello found himself in trouble again; Lehigh Truck Leasing Company, a successor firm to E. G. Maintenance, had submitted a bid lower than A.N.R. (DXB)*. Masiello and Frank Brasco both telephoned Doherty, who said he would look into the situation (Tr. 1158; 186).

In early November, 1967, Doherty found out from Seth Brewer that Lehigh Truck Leasing had been investigated and recommended for award by the New York Postmaster and Regional Office and that "it appeared we had no choice but to make the award to Lehigh" (GX 32; Tr. 186-87).

Doherty reported this news to Frank Brasco, who asked, "Couldn't you check to see if anything could possibly be done?" (Tr. 187). Doherty conferred once more with Brewer, who suggested that Lehigh could be referred to the Small Business Administration ("SBA") to see whether the SBA would issue it a Certificate of Competency, a procedure often undertaken by Government agencies to check the financial responsibility of potential Government contractors. If Lehigh passed the test it would get the award, but if it failed, A.N.R. would have the contract (Tr. 187-88).

On November 3, 1967, one of Seth Brewer's aides at the Bureau of Facilities had drafted a memorandum from Brewer to the New York Regional Office approving the award to Lehigh (GX 34). Frank Brasco's telephone bills showed calls to A.N.R. Leasing on November 8 and November 9 (GX 91). On November 9, the Brewer memo-

* Another firm, Range Rental Corp. was also lower than A.N.R., but had only offered five trucks, and thus did not pose serious competition (DX B; Tr. 198).

random went out, redrafted by Brewer to direct a referral to SBA rather than an immediate award to Lehigh (GX 34, 35).*

Late in November, 1967, Doherty advised Frank Brasco to call the political liaison office at SDA concerning Lehigh (Tr. 198). In December, 1967, SBA declined to grant a Certificate of Competency to Lehigh and the Post Office finally awarded the contract to A.N.R. Frank Brasco reported that he had followed Doherty's advice by contacting SBA himself (Tr. 197-99).

e. The end of the first phase: Michael Sullivan delivers \$2000 to Doherty, saying it came "from Uncle Joe".

Masiello's partnership plan with Ralph Ferraro and Joseph Brasco fell through at a meeting between them at a restaurant called Gardio's, across the street from A.N.R. on 149th Street in the Bronx, in November or December, 1967. Masiello told them that he would have to pay \$50,000 down for new trucks for the Post Office contract. Ferraro and Joseph Brasco refused to contribute, Joseph Brasco maintaining that "the introduction [to Frank Brasco] was good enough" (Tr. 1160). Masiello promised to recompense them if the contract was profitable, but "the partnership was broken right then and there immediately" (Tr. 1160; 1252-53).

Sometime in the fall of 1967, Brewer showed Doherty a newspaper article describing a "maiming" charge which had been brought against John Masiello, Jr.** and went on

* Frank Brasco called Masiello twice more at home on November 15, 1967 (GX 91).

** John Masiello, Jr. and others had been charged in September, 1965, with the maiming and fatal beating of a Yonkers, New York stockbroker (GX 44A; Tr. 631).

to state that John Masiello, Sr., had "alleged Mafia connections" (Tr. 201). Doherty read the article to Frank Brasco over the telephone. Brasco reassured Doherty:

"that there was no conviction in the Masiello, Jr. case * and those were old stories about Masiello of having ties to the Mafia and they had never been proved and he ought to know . . . that he [Brasco] had been in charge of the Rackets Bureau of the Brooklyn DA's Office, so there was nothing to worry about." (Tr. 201-02).

In November, 1967, Doherty and Michael Sullivan discussed the fact that they were unable to meet their obligations on several notes they had signed relating to the financing of political campaigns.** Sullivan told Doherty that "maybe he could get some money from 'Uncle Joe'." One evening, several weeks later, in Sullivan's office, Sullivan handed Doherty an envelope containing about \$2,000 in cash. Sullivan told Doherty "this is from Uncle Joe" (Tr. 202-04).***

* The case had in fact still not come to trial as of the spring of 1968 (GX 44A; Tr. 631).

** In an effort to discredit this part of Doherty's testimony, defendant offered the testimony of Sullivan's ex-wife Lucy who stated that her husband was not in debt at the time and could not have contributed money to political campaigns because, "He was an employee of the Post Office Department". (Tr. 1908). The Government established in its rebuttal case that Sullivan was forced to take out a loan of \$700 for bill payments and medical expenses in January, 1968 (GX 94; Tr. 294-47).

*** Doherty, who had refreshed his memory from bank records, used \$1298 of the \$2000 to pay down a note for a loan to finance a campaign of Senator Brewster (Tr. 204).

3. The second phase—January through May, 1968: the efforts to get Masiello a loan and mileage benefits.

a. Introduction.

A central part of the Government's case was proof that Frank Brasco made continued efforts, throughout the spring of 1968, to assist Masiello in obtaining a large, long term loan for A.N.R., and that Brasco agreed with Weiner and Doherty that he would receive cash under the table for his troubles in promoting the loan. Frank Brasco insisted at both trials that his only relationship with Masiello had to do with Masiello's complaints to Brasco (in Brasco's role as a Congressman on the Post Office Committee), that A.N.R. was being unfairly treated by the Post Office Department. Thus, Brasco swore at both trials not only that he had never agreed to a cash payoff in return for aid in obtaining a loan for Masiello, *but also that he had never even talked with Masiello, Doherty, Weiner or anyone else about helping Masiello get a loan.* The Government offered at trial not only the testimony of Masiello, Doherty and Weiner, but also that of three other witnesses and much documentary corroboration to show that Brasco was deeply involved in the efforts to get a loan for Masiello, and that his testimony about complete non-involvement was perjurious.

b. Mileage benefits under the contract.

A.N.R.'s contract, effective January 15, 1968, ran until June 30, 1968, and was renewable at the Government's option (GX 4)*. Almost immediately after starting to fulfill the contract, Masiello realized, as he had feared, that he would lose money at the \$33 per diem rate. Masiello complained to Doherty that A.N.R. was using the trucks more

* The January 15, 1968 beginning date was occasioned by the 1967 delays in making the award; June 30, 1968 was the fiscal year end (Tr. 200, 280).

than the contract anticipated, and was advised by Doherty to put his complaint in writing (Tr. 1184, 209). A few weeks later Masiello called Doherty to complain again. Doherty reported the call to Frank Brasco, who asked Doherty to come to New York to advise Masiello in person (Tr. 210-11).

On an evening in March, 1968, Masiello, Doherty and Frank Brasco met in Brasco's home in Brooklyn, New York. Doherty advised Masiello to document the actual mileage run by his trucks and the amount of money spent for gasoline and tires (Tr. 1184-87, 211-13). Shortly thereafter Masiello caused A.N.R. to send a letter outlining the problem to the New York Post Office, with a copy to Doherty which Doherty turned over to Seth Brewer (GX 14; Tr. 1187, 213-14). Masiello followed the letter up by submitting to the Post Office a series of invoices billing it for excess mileage and fuel consumption (GX 15, Tr. 1190-92). A.N.R.'s mileage claim was finally disapproved on May 28, 1968, three days before A.N.R.'s entire contract was terminated.

c. The loan

(i) Introduction.

By early 1968 A.N.R. had leased about thirty-five tractors to service the new Post Office contract and was suffering under heavy monthly finance charges (Tr. 1165-66). In March, 1968 both Masiello and Frank Brasco spoke to Doherty about the possibility of obtaining a million dollar long term loan for A.N.R. (Tr. 1166-67, 217-19). * Doherty who by this time was speaking to Frank Brasco on the

* Doherty testified that he believed the loan was first mentioned to him by Masiello and Frank Brasco at the meeting at Frank Brasco's house in March, 1968, referred to *supra* (Tr. 218-19). According to Doherty, the figure first mentioned to him by Masiello and Frank Brasco was \$1.3 million (Tr. 225).

average of *once* a day (Tr. 208), undertook to mention the loan to Joseph Weiner, a mortgage broker whom Doherty had met in December, 1967 * and had introduced to Frank Brasco in early 1968 (Tr. 218-20). Doherty told Weiner what A.N.R. needed, and Weiner said that "if everything checked out the deal could be feasible" (Tr. 1326).**

(ii) Frank Brasco agrees with Doherty and Weiner to take part of Weiner's fee on the loan.

Shortly thereafter, Frank Brasco, Doherty and Weiner met in Brasco's Capitol Hill office to discuss the loan (Tr. 224, 84, 1318). Among other things, Frank Brasco told Weiner that the principals of A.N.R. were alleged to be "associated with organized crime and the Mafia, and that John Masiello, Jr., had been charged with 'maiming' in Westchester County (Tr. 1331). Weiner described financial statements and other papers which he would need, and advised Brasco that Masiello would have to pay Weiner a fee of 1% of the loan (Tr. 227).

At a separate meeting, Weiner and Doherty agreed that half of Weiner's fee should go to Frank Brasco, and that they would split the remaining half, with a mutual friend named John Carter who would hold Doherty's share since Doherty was still a Post Office employee (Tr. 228, 1327).

* During the six months they knew each other, from December, 1967 until June, 1968, Weiner and Doherty met from one to ten times per week, and spoke over the telephone ten to twelve times per week (Tr. 1323).

** According to Weiner, Doherty mentioned to him in one of their first conversations, as Frank Brasco did later, that Masiello was under pressure from "organized crime or the Mafia" to pay back moneys used by him to purchase the trucks (Tr. 1326a-1328, 1331). Weiner also said that both Doherty and Brasco referred to Masiello and A.N.R. as Brasco's "client" (Tr. 1325, 1328-9).

According to Weiner this agreement to pay half the fee to Frank Brasco was confirmed at a meeting between Brasco, Weiner and Doherty at a Washington, D.C. restaurant called Danker's shortly after the three met at Brasco's Capitol Hill office (Tr. 1333). According to Doherty, he first discussed the fee split with Frank Brasco on an occasion when they were alone in Brasco's room at the Congressional Hotel in Washington (Tr. 230).

(iii) Frank Brasco and Doherty agree that Thomas McKeever has to go.

During March of 1968, an officer of A.N.R. named Thomas McKeever came to Washington twice to bring papers relating either to the proposed loan or to A.N.R.'s claim for additional mileage. On the first occasion, Doherty saw McKeever in Brasco's office during the morning, and later saw Brasco and McKeever again at a cocktail party given by the National Association of Letter Carriers.* After the cocktail party Brasco, McKeever and Doherty returned to Danker's Restaurant with the Atlanta, Georgia Postmaster to discuss the possibility of A.N.R., or another Masiello shell company called Terrace Trucking, expanding its Post Office contracts to other parts of the country (Tr. 237). Two or three weeks later, McKeever was in Washington again with more documents, and this time met with Doherty and Weiner in Doherty's office (Tr. 238, 1331).

Shortly after McKeever's second trip, Doherty complained to Frank Brasco that McKeever was unable to talk intelligently about A.N.R.'s problems, and that "he appeared to me to act just like a dumb hood and we couldn't have him doing business with the Department" (Tr. 239).

* Doherty's office diary for March 19, 1968, showed "11:00 Cong. Brasco" (GX 37A). The Government also offered motel charges for McKeever at the Skyline Inn in Washington for March 18-20 (GX 42).

Brasco asked Doherty to explain this to Masiello. Shortly thereafter Joseph Brasco took Doherty to meet Masiello at a restaurant called Chez Vito in Manhattan. The three had a drink while Doherty told Masiello "about Mr. McKeever's behavior in Washington" and that "as sensitive as things were" McKeever should be replaced. Masiello expressed agreement (Tr. 239-41).*

(iv) Frank Brasco, Masiello, Weiner and Doherty meet at Brasco's lower Manhattan law office.

In very early April, 1968, Frank Brasco called Doherty looking for Joe Weiner and complaining that Masiello had not heard anything from Weiner after sending information down (Tr. 242). Doherty reached Weiner by telephone, was told that Weiner needed more data before he could put a loan together, and reported that back to Brasco (Tr. 243).** Brasco asked that Doherty arrange a meeting between Weiner and Masiello in New York, and Doherty undertook to do so (Tr. 243).

Masiello, Doherty and Weiner all testified to meeting with Frank Brasco at Brasco's law office on lower Broadway on a weekday morning in early April, 1968.*** At the meeting, Weiner discussed the loan with Masiello, Doherty and Brasco, and discussed additional documents which he would need to put the loan through (Tr. 1167-73; 257-58; 1340-42). Outside of Masiello's presence that same morning at Brasco's office, Brasco, Doherty and Weiner confirmed their agreement that one-half of Weiner's fee would

* Masiello testified he had been in Chez Vito's, but that he could not remember meeting Doherty and Joseph Brasco there (Tr. 1184).

** According to Weiner, he had begun contacting various institutional lenders after receiving some preliminary financial information from A.N.R. in March, 1968 (Tr. 1331-32).

*** This was the only time Masiello and Weiner ever met (Tr. 1172, 1327).

go to Frank Brasco. After rejecting the possibility that the money could be paid to his law firm as a legal fee or delivered to him overtly as a political contribution, Frank Brasco decided that the money should be delivered in cash to his "Uncle Joe" (Tr. 258-59, 1342-43). Frank Brasco instructed both Doherty and Weiner not to discuss with Masiello the fact that Brasco would receive half of Weiner's fee, and they did not do so (Tr. 260, 1343; *see also* Tr. 1726-27).

To corroborate the testimony of Masiello, Doherty and Weiner that this meeting occurred, the Government offered documentary evidence reflecting the following: (a) a telephone call from Doherty's Washington office to Weiner's New York office on Wednesday, April 3, 1968 (GX 39A); (b) a telephone call from Frank Brasco's Washington office to Weiner's New York office on April 4, 1968 (GX 91)*; (c) a telephone call from Doherty's office to Frank Brasco's New York law office on April 5, 1968 (GX 39A); (d) an entry in Doherty's office diary, in his secretary's handwriting, showing that a meeting had been scheduled for Weiner, Brasco and Doherty in New York on April 11, 1968 (GX 37A-1); (e) Doherty telephone records showing that he was at the Masters Golf Tournament in Georgia on April 11, 1968 (GX 39A); (f) a Doherty American Airlines ticket from Washington to LaGuardia for \$22.05 on April 8, 1968 (GX 38); and (g) a check written by Weiner to American Airlines on April 8, 1968 for \$44.10 drawn on the account of Washington Finance and Investment Corporation, the corporate name through which Weiner acted in trying to get the loan for A.N.R. (GX 36)**.

* This was one of only four calls by Brasco to Weiner in Brasco's records. The others are discussed, *infra*, p. 54.

** April 8, 1968 was a Monday, and Weiner remembered that the meeting was on a Monday, since he left a regular Monday meeting at the mortgage brokerage firm for which he worked in New York to attend it (Tr. 1336). In 1968 Weiner lived in Arlington, Virginia, and owned and worked at Washington Finance and Investment Corporation, located in Falls Church, Virginia, as well as working at Friedman, Kaplan, Drew, a mortgage brokerage firm in New York (Tr. 1321-1322).

On April 26, 1968, Weiner sent a telegram from Washington Finance and Investment to A.N.R. advising that "we feel we are in a position to make a loan commitment" of \$875,000 for three years, requesting additional financial statements and indicating that the fee for obtaining the loan would be \$35,000. On April 27, 1968, John Masiello, Jr., signed and returned a copy of the telegram, indicating that its "terms and conditions [were] satisfactory" (GX 5). Shortly thereafter, A.N.R.'s accountant, Harold Schore, spoke to Weiner by telephone and arranged to send Weiner A.N.R.'s current financial statements (Tr. 1023, 1251-54; GX 6-11).

Weiner and Doherty differed in their testimony as to how the \$35,000 fee referred to in the telegram, which was 4% of the proposed \$875,000 loan, was devised. According to Weiner, he decided to fix the fee at 4% and confirmed with both Brasco and Doherty, before sending the telegram, that the size of the fee would be satisfactory to Masiello (Tr. 1351). According to Doherty, Weiner told him in April, 1968, that he was raising the fee from 1% to 4% because he would be obligated to pay 3% of the loan amount "under the table" to a representative of the lending institution (Tr. 263-64).

(v) Frank Brasco consults with Harry Kagan about the loan.

In April and May, 1968, Frank Brasco often had difficulty locating Weiner to find out about the progress of the loan. Thus Brasco made about six calls to Doherty complaining that Masiello had heard nothing from Weiner, and on one occasion warned Weiner that "he better not be yanking Masiello and these guys around because they play tough games and they are rough guys" (Tr. 264).

Harry Kagan, a Washington liquor store owner who was Weiner's cousin and also knew Doherty and Brasco, saw

Brasco, Doherty and Weiner together one day in Danker's Restaurant in the spring of 1968 (Tr. 934-36). The next day, Weiner told Kagan that he was going to try to arrange financing for a trucking company, and would earn a commission on the deal (Tr. 946).

At around the same time, both Frank Brasco and Doherty called Kagan looking for Weiner. Doherty explained to Kagan that:

"Weiner was supposed to get them a loan, to get Joe and this trucking company a loan, and they weren't getting any results out of Weiner" (Tr. 936-38).

Later, in May or June, 1968 Kagan, who had no use for Weiner, discussed with Frank Brasco the question whether Weiner could be relied on to get the trucking company a loan. Kagan told Brasco that:

"... it was quite embarrassing to me. I had brought Weiner to Joe Doherty and Weiner was supposed to help get them a loan for this trucking company and he wasn't producing it and he was doing the same thing he did to the rest of the family of turning people around and telling them lies . . . I was just giving [Frank Brasco] like general background of Weiner, not to expect anything from him, to be careful of him . . . and not to trust him" (Tr. 939-40).*

* Brasco admitted calling Kagan in the spring of 1968 and even admitted that he might have asked Kagan "Is Weiner there?", but insisted that he had really called to locate Doherty, not Weiner (Tr. 2540). Likewise Brasco admitted that Kagan warned him not to rely on Weiner, but insisted that the warning had come out of the blue, and not in any discussion on the subject of whether Brasco should count on Weiner to get a loan (Tr. 2543-50).

(vi) Frank Brasco asks his law partner Daniel Himmel to call Masiello.

During the spring of 1968, one of Brasco's New York City law partners was a man named Daniel Himmel (Tr. 950). In "early" 1968, Frank Brasco asked Himmel to call Masiello*. Himmel did so ** and then met Masiello at his trucking company's office on 149th Street in the Bronx. Masiello explained that he had several loans at the Royal National Bank and wanted to reduce the amount of monthly payments on them by extending them. Masiello and Himmel went to see the Royal National Bank's 149th Street branch manager, who agreed to extend the loan, and asked for current financial statements. Himmel asked Masiello to get him the financial statements and a fee of \$500, but never received either (Tr. 950-955)***.

* Earlier, "probably in 1967", Frank Brasco had introduced Himmel to Joseph Weiner and Joseph Doherty in a Washington cocktail lounge (Tr. 951).

** At the time of the second trial, Himmel still had Masiello's name and telephone number in his telephone register (GX 89).

*** Himmel, who was not discovered by the Government until after the first trial (Tr. 956), obviously gave significant new evidence that Frank Brasco was trying to help Masiello solve his financial problems. Brasco therefore undertook to show that Himmel, his chosen law partner, was a vengeful deadbeat, eliciting that Himmel had been suspended from practice, and suggesting through other witnesses that Himmel had done various immoral things, such as stealing furniture from the firm (Tr. 968, 2081-82). However, these efforts by the defense to paint Himmel as a lying, spiteful man fell apart when Frank Brasco himself, in an uncharacteristic moment of candor, corrected his initial testimony that he had not seen Himmel for "a couple of years" and admitted that he had last seen Himmel when Himmel came to court to *wish Frank Brasco well* while the jury was deliberating during Brasco's first trial (Tr. 2586-87).

(vii) Frank Brasco and Doherty arrange for the Post Office to notify Masiello that his contract will be extended.

In April, 1968, Frank Brasco arranged for Joseph Weiner to meet Brooklyn political leader Meade Esposito, so that Esposito might introduce Weiner to officials of the Kings Lafayette Bank, with which Esposito was affiliated, as a possible source of financing for Weiner's business ventures (Tr. 276, 1356). Brasco warned both Doherty and Weiner that they should not tell Esposito of his (Frank Brasco's) involvement with Masiello because Esposito held "Masiello . . . and his associates in his disfavor" (Tr. 1360)*.

On May 23, 1968, a day on which Doherty and Weiner were with Frank Brasco in New York, Weiner responded to complaints about delays in the loan to Masiello by explaining that a lender would need written assurance that the Post Office contract would be renewed by the Post Office beyond its June 30, 1968 termination date (Tr. 281, 1364-65). Doherty spoke to Frank Brasco about the problem and called Seth Brewer from Brasco's office, to ask if a letter of renewal could be issued to A.N.R. (A call from Brasco's New York office to Brewer's number on May 23, 1968 appears on Doherty's office telephone records, GX 39A, and other exhibits, GX 41A and 50, show that Doherty and

* On May 23, 1968, Brasco introduced Weiner to Esposito, who in turn was to take them to Kings Lafayette Bank for a meeting (Tr. 277-280, 1361-33). Both Doherty and Weiner testified about this introduction. In addition, the Government offered in evidence a Doherty expense voucher showing his trip to Brasco's office in New York City on May 23, 1968 (GX 41A), and a copy of a letter Weiner had written to a Lafayette Bank official on May 21, 1968, mentioning the scheduled meeting of May 23 and forwarding certain papers as "Congressman Frank Brasco requested" (GX 50). Nevertheless, Frank Brasco who was committed at the trial to the position that he had barely even known who Weiner was, denied that he had ever arranged for Weiner to meet Esposito or any Kings Lafayette officials (Tr. 2360, 2552-54; GX 57).

Weiner were in fact in New York City on May 23.) Brewer explained to Doherty that any such letter should come from the local New York Post Office (Tr. 282).

Doherty and Brasco then agreed that they would arrange to have Masiello call the New York Postmaster and thereafter would call the Postmaster themselves about renewing the contract. Doherty called Masiello to give him this message (Tr. 284-85)*.

On May 24, both Frank Brasco and Joseph Doherty telephoned Amos Coffman, then Deputy Assistant Postmaster General in the Bureau of Facilities in Washington, to ask Coffman to assist in putting the renewal through (Tr. 2993-95)**. Coffman then telephoned George Hass, the New York Postmaster's deputy, to recommend that the contract be renewed (Tr. 2995).

The events of May 24, 1968 on the A.N.R. contract at the New York Postmaster's office were summarized in a contemporaneous memorandum made by Hass to the New York Postmaster, John Strachan:

"Attached letter addressed to A.N.R. Leasing Corporation advising them that we are renewing the lease on contract 68-47 tractor hire.

The first period of this lease will expire at the end of fiscal year 1968, and they do have the option to renew for 3 one year periods.

At 12 Noon, in response to your call, I contacted the garage, checked on the lease and found everything was in order. You advised that you had received a call from Mr. Doherty of the Post Office Department

* Doherty's telephone records show two calls to A.N.R. on May 24, 1968 (GX 39A).

** Coffman testified in the Government's rebuttal case (Tr. 2990-3010).

on this matter. Since the request from Washington, I called Mr. Amos J. Coffman and he informed me that all A.N.R. Leasing required was to be advised that the contract would be renewed for one year. At the same time, a Mr. Marsielo (sic) of A.N.R. Leasing contacted your office and stated that Mr. Doherty told him to call you. *Later at about 3:15 P.M., Congressman Brasco called on the same subject*" (GX 47).* (Italics added.)

That same day, May 24, 1968, the New York Postmaster notified A.N.R. by letter that its contract would be renewed (GX 16)**.

(viii) Masiello delivers \$10,000 in cash to Joseph Brasco.

Earlier in May, 1968, Masiello met with Joseph Brasco and Ralph Ferraro at Gardio's Restaurant in the Bronx. Masiello explained that he expected help from the Post Office with his "mileage" problem under the contract, and that the contract was "working out". Brasco and Ferraro then told Masiello that \$10,000 "had to be sent down below" (Tr. 1193-95). Within two weeks, again at Gardio's, Ma-

* As set forth above, Frank Brasco denied at the trial that he ever had anything whatsoever to do with obtaining a loan for A.N.R. and thus also denied that he had ever discussed a renewal of A.N.R.'s contract with anyone or even that he had been aware that there had been any question whether the contract would be renewed (Tr. 2268, 2322-23). Hass' memo and the testimony of Amos Coffman, who also described a May, 1968 meeting with Doherty and Frank Brasco at Danker's Restaurant in which they discussed procedures for renewing Post Office contracts (Tr. 2992-93), were devastating evidence that Brasco was lying.

** On the same date, to ensure that Weiner would quickly have a copy of an official-looking renewal letter in hand, Doherty himself prepared and sent a letter to A. N. R. confirming that the contract would be renewed, and provided Weiner with a copy. Doherty then instructed his secretary to destroy all office copies of the letter (Tr. 284-287, 1366-67; GX 17).

siello delivered to Joseph Brasco and Ralph Ferraro an envelope containing \$10,000 in fifty and one hundred dollar bills (Tr. 1204-05, 1292).*

4. Phase Three—June through November, 1968: Brasco's efforts to help Masiello keep dealing with the Post Office after A.N.R.'s contract was cancelled.

a. Introduction.

Frank Brasco maintained at trial that he did absolutely nothing on Masiello's behalf after he learned, according to him, for the first time in late May, 1968, that Masiello was alleged to be a racketeer (Tr. 2689). But the Government proved at trial that Brasco kept on trying to change the Post Office's decision to cancel A.N.R. during June, 1968, and, more important, that Brasco schemed during June through November, 1968, to assist Masiello in getting Post Office contracts for other firms which would appear to the Post Office Department to be independent of A.N.R. but which were actually controlled by John Masiello.

b. The cancellation of A.N.R.'s contract.

In April, 1968 officials in the Post Office Department in New York received and forwarded to Washington a copy of a magazine article describing Masiello's alleged organized crime connections. Timothy May, General Counsel of the Post Office, requested that the Postal Inspection Service investigate the allegations contained in the article (Tr. 623-24).

* Masiello said that his A.N.R. associate Thomas McKeever was present when he delivered the envelope to Joseph Brasco and Ralph Ferraro (Tr. 1204, 1291). Called by the defense at the first trial, McKeever denied being present at any such payoff. Neither side called McKeever at the second trial (Tr. 2659-2662).

Doherty learned about the article and the investigations, and reported to Frank Brasco in April that "it is getting a little risky to keep pushing these guys". Brasco replied that "it is just the old stuff coming up again, don't worry about it" (Tr. 267).

In late May, 1968, Timothy May received a written report from the Postal Inspection Service confirming the criminal records and alleged organized crime involvement of John Masiello, his son John Masiello, Jr., and Thomas McKeever (Tr. 625; GX 44A). On Monday, May 27, May instructed members of his staff to notify the Bureau of Facilities that it should terminate the A.N.R. contract, and communications between Washington and New York branches of the Post Office followed during that week on the subject of how best to undo the May 24 renewal letter and notify A.N.R. of the cancellation (Tr. 625-26; GX 47A-47D).*

Doherty learned of May's decision on May 27, and notified Frank Brasco (Tr. 288). As Doherty's diary indicates, Brasco and Doherty met on Tuesday morning, May 28, in Brasco's Capitol Hill office (Tr. 289; GX 37A-2). Brasco asked what could be done for A.N.R., and Doherty said Brasco could try calling the General Counsel, adding that "I didn't think it would work" (Tr. 291).

Doherty and Brasco then discussed for the first time a scheme which was later to bring Masiello back into the Post Office through another corporate name:

"[Brasco] says, 'Well, what else could we do?'"

"We discussed the possibility of Terrace [another corporation controlled but not owned of record by Masiello] taking over the contract after A.N.R. was thrown out."

* May did not learn that the Postmaster in New York had sent A.N.R. a letter renewing its contract until Tuesday, May 28 (Tr. 626-27).

"I recommended against it and said 'That is too risky, its too close to being tied to Masiello, and they wouldn't buy it, the officials of the Department wouldn't buy that'."

"Frank then asked, 'What about another company that had the whole appearance of no connection with Masiello or any of the people of A.N.R.?' "

"I said, 'That would work, but it would have to be totally separate from Masiello'." (Tr. 292)

For that same day, May 28, Frank Brasco's Capitol Hill office telephone records show calls to Masiello's home, to Joseph Brasco and to "Weiner" in Baltimore, Maryland.*

On Memorial Day, Thursday, May 30, General Counsel Timothy May received a telephone call from Frank Brasco at his home in Washington.** Brasco asked May "just what [the Post Office Department] thought we were doing in cancelling the contract". (Tr. 630). May interrupted to warn Brasco that he might not "know who these people are that you are dealing with," and read to Brasco the following information from the Postal Inspection Service's file, which May had at home with him:

"John Masiello, Jr., is 25 years of age. He was arrested on September 23, 1965 on a first degree assault charge in connection with the fatal beating of William Friedman and the blinding in one eye with multiple fractures of the face of Alexander Benisatto, both stockbrokers residing in Yonkers, New York.

* Joseph Weiner was frequently in Baltimore during the spring of 1968 (Tr. 1367). For Brasco's various inconsistent explanations of these calls, see page 54 *infra*.

** May, who testified as a Government witness in both trials, had been appointed Post Office General Counsel by President Johnson in February, 1966 and served until January, 1969 (Tr. 622).

"'Mr. Masiello, Jr., is presently out on \$10,000 bail and the District Attorney's office indicated a trial in the near future was expected.'

"... Mr. Thomas McKeever, who was the authorized officer to sign the successful bid for A.N.R. Leasing Company has a lengthy criminal record dating back to January, 1939. His record of arrest include felonious assault, grand larceny (trucks), and he was arrested by the FBI in 1958 for violation of the anti-racketeering statute for which he was sentenced to five years in prison and five years probation."

"... John Masiello, Sr., who was general manager of the firm. No additional information as to arrests. However, inquiry of the Confidential Bureau of the New York City Police Department and the Yonkers Police Department revealed that Masiello, Sr. is known as a prominent member of organized crime.

"In that connection on December 9, 1964 he appeared before the New York State Crime Investigation Committee, which was conducting an inquiry into loan-sharking. Masiello invoked his constitutional privilege under the Fifth Amendment a total of 48 times'." (GX 44)

When May finished reading, Brasco's response was as follows:

*Mr. Brasco said that he was not familiar with the names of the gentlemen I had read to him about, that he was concerned on behalf of a group of innocent people, people who had put up money for the purchase of these trucks, had loaned money, and he was concerned that if the contract was cancelled then the company would be unable to pay the loans that these innocent parties had made. (Tr. 633).**

* This testimony by May, of course, dropped like a bombshell on Brasco's case. Brasco responded by attacking May who hardly seemed to have any special motive to label a Democratic Congressman a liar (Tr. 660-2).

The conversation ended with May explaining that he was "very sorry about these innocent people", but that the Post Office Department simply could not do business with persons like the Masiellos and McKeever (Tr. 633).

The next day May mentioned Frank Brasco's "irate" call to Doherty, who then discussed the situation with Brasco by telephone * and subsequently told May that Brasco would like to speak to May again about A.N.R. (Tr. 294-95, 633).

On the afternoon of Friday, May 31, Frank Brasco and May spoke again by telephone (Tr. 634; 295). Timothy May testified that:

"... the Congressman wanted to know whether or not, if the ownership of these trucks were transferred to different parties, whether or not the new owners of the trucks could have a postal contract". (Tr. 634) **

May replied that if the transfer were completely bona fide, the new owners would be eligible bidders (Tr. 635). ***

* Doherty's telephone records show calls to Frank Brasco's New York City home and office on May 31, 1968 (GX 39A). Brasco typically spent Tuesday through Thursday in Washington, staying at the Congressional Hotel, and the rest of the week at home in New York City (Tr. 2294).

** The Government argued, of course, that this was a completely phoney pitch by Brasco, who already was planning that any company which took over the trucks would still be controlled by Masiello (Tr. 3222).

*** Further bolstering May's testimony, Amos Coffman testified that May told him of this very conversation with Frank Brasco on the same day that it occurred (Tr. 2999).

Late in the afternoon of Friday, May 31, 1968,* after May's second conversation with Frank Brasco, a letter was hand carried by postal employees to A.N.R. in the Bronx, notifying A.N.R. that the Post Office's earlier renewal letter was being "withdrawn", and that the contract would terminate on June 30, 1968 (GX 18, GX 47C; Tr. 1216).

c. Brasco's efforts to aid Masiello and defraud the Post Office after the cancellation.

Within "three or four days" of receiving the May 31, 1968 notice that his contract would not be renewed, Masiello called Joseph Brasco to complain (Tr. 219). Masiello then repainted the A.N.R. trucks, transferred them to Randen Trucking, another corporation which he controlled but did not own or manage of record, and instructed Randen's officers "to make sure that Randen was kept away from A.N.R. Leasing, there was no affiliation whatsoever". (Tr. 1219-1234) This accomplished, Masiello caused Randen to submit a bid to the Post Office on its new solicitation for the contract A.N.R. had held (GX 20; Tr. 1226-28), and delivered a \$300 cash payoff to the Post Office supervisor who came to inspect the trucks (Tr. 1232-33). Randen turned out to be the low bidder, was found to be qualified and started providing trucks to the Post Office in late June, 1968 (Tr. 1235).

After these bids were opened in the "latter part of June or the beginning of July" Masiello called Joseph Brasco again: "I just let him know that I was getting back into the Post Office under the name of Randen Trucking". (Tr. 1234, 1817).**

* The delivery of the letter was held up pending May's second conversation with Brasco (GX 47C).

** Masiello also testified that at this time considered putting in a bid under the name of Terrace, a shell corporation of his. He had earlier, in April or May, 1968, sent financial projections for Terrace to Joseph Weiner (Tr. 1220-21, 1371). As noted, *supra*, [Footnote continued on following page]

Meanwhile, starting in early June, Frank Brasco took a number of steps on Masiello's behalf.

(i) Brasco and Weiner.

As indicated above, Weiner had in late May been assured that the contract would be extended. When he learned of the cancellation a week later, he complained to Frank Brasco:

"I told him I could not understand what was going on and he said not to concern myself, that they were working on getting the contract awarded to another one of Masiello's companies." (Tr. 1370).

Weiner and Brasco discussed the possibility of making the loan to the new company. Weiner warned that any lender would require personal financial statements of the principals of the company and that Masiello's involvement would therefore necessarily surface. Weiner instead suggested to Brasco that some lenders might give a smaller loan strictly on the value of the trucks without requiring such financial statements (Tr. 1371-1374).

Later in June, Weiner and Frank Brasco dined together in Washington (Tr. 1373). They again discussed the possibility of a new Masiello-controlled company taking over the Post Office contract and the possibility of obtaining a loan for that company. Brasco said he would check with his "client" Masiello and get back to Weiner (Tr. 1374).

At the same meeting Frank Brasco told Weiner that:

"Mr. Masiello was very upset with Mr. Doherty because money had been paid to Mr. Doherty and there

at pp. 31-32, Doherty testified that he discussed with Frank Brasco the possibility of Terrace taking over the contract as A.N.R. was being thrown out (Tr. 291-2). Further, Joseph Weiner testified that he was told by Brasco that there was the possibility of Terrace getting the Post Office award (Tr. 1370-71).

was not results gotten . . . one of the reasons money was paid was to keep the trucks rolling as there were problems, that the trucks were being run and there wasn't proper reimbursement from the Post Office Department in New York." (Tr. 1373)

Frank Brasco's Capitol Hill office telephone records showed calls to "Weiner, Baltimore" on June 12 and June 20, 1968 (GX 91).*

On June 22, 1968, Weiner prepared the following letter to Frank Brasco for the signature of John Russo, a partner of Weiner's at Washington Finance and Investment Corporation:

"In Re A.N.R. Trucking
N.Y., N.Y.

Dear Frank:

Please advise us what your client intends to do re: our loan offer." ** (GX 51)

Weiner never spoke with either Frank Brasco or Joseph Doherty again, and no loan to any of Masiello's companies ever went through (Tr. 1381-82).

* Weiner recalled talking by telephone with Frank Brasco in June, 1968, but not the precise discussions they had (Tr. 1380-81). Again, see p. 54, *infra*, for Brasco's various inconsistent explanations of these calls.

** Since Weiner could not swear that anyone had mailed the original, of which GX 51 was his retained carbon (Tr. 1374), GX 51 was not received as proof that the letter had been received by Frank Brasco, but only as proof as an act in furtherance of the conspiracy (Tr. 1545). Nevertheless, the letter was strong evidence against Frank Brasco, for unless the jury believed that Weiner had created the carbon copy out of thin air before delivering it to the Baltimore U.S. Attorney in 1969 (Tr. 1547), the letter was conclusive corroboration of Weiner's testimony that he had in fact discussed a loan to A.N.R. with Frank Brasco.

(ii) Brasco and Howard Cook.

Howard Cook replaced Michael Sullivan as a congressional liaison in the Postmaster General's office in the spring of 1968 (Tr. 2951). In "April, May or June" of 1968, Frank Brasco invited Cook to his office. Cook testified that Brasco:

"... advised me that he had a constituent problem.* He had a trucking company with a contract with the Post Office Department and they were being cancelled and he asked me to check into it" (Tr. 2953).

Cook promised to look into the matter, found out that the contract was being cancelled because of "notoriety concerning the ownership or management of the trucking company", and, accompanied by the Postmaster General's Executive Assistant, Douglas Nobles, reported this back to Brasco (Tr. 2954, 2956).

Shortly thereafter Brasco again asked Cook to his office:

He asked me if there would be any reconsideration by the Department if the management of the trucking company were changed . . . He said that it was his understanding that the trucking company management was prepared to step aside in favor of others and bring in people without taint . . . He said that they had a former FBI agent in line for the job, a former black FBI agent (Tr. 2955).

Cook told Brasco he would follow up in the matter, but did not recall any further discussion with Brasco about it (Tr. 2955-56).**

* Of course neither Masiello nor anyone connected with A.N.R., a Bronx firm, was a constituent of Brasco.

** Brasco, who flatly denied ever having had any such conversations with Cook (Tr. 2592-3), tried mightily to discredit Cook on

[Footnote continued on following page]

(iii) Brasco and Douglas Nobles.*

In 1968, Douglas Nobles was Executive Assistant to Postmaster General Marvin Watson, in charge of the Post Office Department's Congressional relations (Tr. 1912-13). In early June, 1968, Nobles accompanied Howard Cook to Frank Brasco's office and told Brasco that because of the criminal records of the principals "the decision to cancel the [A.N.R.] contract was final and that it would not be changed" (Tr. 2916).

About one week later, on June 11, 1968, Frank Brasco telephoned Nobles at Nobles' office. Among other things, Brasco told Nobles that he wanted to see the Postmaster General about "the A.N.R. situation." Nobles told Brasco:

"that the matter of the A.N.R. contract was settled and irrevocable and if he needed to discuss it further he should probably see the Assistant Postmaster General for Facilities who was in charge of these matters and that I was reluctant to get the Postmaster General involved in a situation where he was not responsible for the decision" (Tr. 2915).

Nobles incorporated the substance of his June 11 telephone conversation with Brasco in a memo to Marvin Watson, adding in the memo that Brasco had not been "pushy", that he "seems to understand" the Department's reluctance to renew the contract, and that if Watson were willing to see Brasco, Nobles "did not believe that Frank Brasco

cross-examination (Tr. 2957-2987). But it was hard to see why Cook, who had been in public service for many years, had been a friend of Brasco, and at the time of trial was Assistant Director of Congressional Liaison for the American Medical Association, would have had the slightest motive to do anything other than favor Frank Brasco in his testimony (Tr. 2950).

* Both Nobles and Howard Cook, *supra*, were called by the Government in its rebuttal case. The Government had only
[Footnote continued on following page]

would be difficult to handle", and thought it would be a "gentlemanly" conversation (Tr. 2921, 2931-32, 2939).*

Brasco in fact had a meeting with Marvin Watson on June 13, 1968 (Tr. 2938).**

(iv) Brasco and Doherty.

Joseph Doherty resigned from the Post Office Department effective June 15, 1968, and set up a public relations office in Washington, D.C., over Harry Kagan's liquor store (Tr. 296). In early July 1968, Frank Brasco telephoned Doherty to say that he wanted to talk with him. At Brasco's invitation Doherty and his family then visited Brasco and his family at Brasco's summer place in Annapolis, Maryland (Tr. 296). At one point when Brasco and Doherty were alone together, Brasco brought up Masiello. Brasco told Doherty (Tr. 296-97):

" . . . that a company by the name of Randen had been formed, which Masiello was not an officer of, and that the president of the company was an ex-FBI agent, a black FBI agent and other people of that ilk and what did I think the chances of Randen keeping

learned for the first time of Nobles' existence as a possible witness on Tuesday, July 9, 1974, the day after the Government rested its direct case (Tr. 2924).

* Nobles, who had made the memorandum in the regular course of his business on the day of the telephone conversation with Brasco, had with him at the trial a xerox copy of the memorandum, which Marvin Watson had supplied to him the week before Nobles testified (Tr. 2917-18). Since the copy was not the "best evidence" and was regarded by the Court as "surplusage" in any event, it was not received in evidence (Tr. 2920-22).

** Neither side called Watson. Brasco had volunteered at the first trial that he had talked with Watson about A.N.R., claiming that the discussion had related to A.N.R.'s mileage problems. At this trial Brasco denied having any such conversation with Nobles as Nobles testified to, and claimed that his conversation with Watson was about his embarrassment over the entire A.N.R. situation (Tr. 2885, 2896-88).

a contract or getting a contract with the Post Office was.

"I told him if they could tie it back to Masiello at all, the chance was nil. Masiello or any part of A.N.R." (298).

d. The conspiracy ends.

When the Post Office contract was let out for bids again in June, 1968, Timothy May directed that the Postal Inspection Service investigate the low bidder, to make sure it had no connection with A.N.R. (Tr. 638). Thus, Randen did not receive an immediate contract, but rather leased vehicles to the Post Office on a per diem basis throughout July, August and September and up through October 26 (GX 53, 54). Finally on October 23, 1968, after the Inspection Service had discovered that Masiello and Randen were one and the same, Randen was notified by letter that its leasing arrangement with the Post Office was being cancelled because it had been "deemed to lack the requisite integrity" (GX 24).

In November, 1968, the Post Office Department put the same contract out for bids yet another time (Tr. 1245). Not one to be easily put off, Masiello notified Joseph Brasco by telephone as to what he was doing and then, on November 15, 1968, caused A.N.R. and another dummy company which he controlled from the background, T.A.B. Trucking, to put in bids on the contract (Tr. 1245-48; GX 25, 26).

Also in November, Frank Brasco called Doherty and invited him for lunch at the Rotunda Restaurant on Capitol Hill (Tr. 298-99). When they met,

"The Congressman mentioned that other bids had been put in by an outfit by the name of T.A.B., about your matter, you know [sic], the Randen thing didn't work, their contract had been cancelled is what he

told me and what did I think the chances of these companies were and I said, none. We had lost the election and just don't push it anymore, and he agreed" (299).*

Neither Masiello nor Doherty ever spoke again with either Frank Brasco or Joseph Brasco about getting the contract for Masiello, and none of Masiello's companies ever did business with the Post Office again (Tr. 302-03, 1250-51).

5. Frank Brasco's December 1970 statement to the FBI

In the spring of 1969, Maryland's United States Attorney Steven Sachs obtained immunity for Joseph Weiner, who had been the subject of a fraud investigation unrelated to A.N.R. and Frank Brasco. Weiner then gave information to Sachs and testified in a Baltimore grand jury about his involvement with Frank Brasco, Joseph Doherty and John Masiello (Tr. 1321, 1391-3; GX 3512). Later Joseph Doherty, who had offered to plead *nolo contendere* to an unrelated conflict of interest charge, also gave information to Sachs' successor George Beall (Tr. 86-88, 92, 340). In October, 1970, both Weiner and Doherty gave long tape recorded statements to Beall (GX 3506 and GX 3514).**

On December 8, 1970, at Beall's request, two FBI agents visited Frank Brasco at his Capitol Hill office. The agents advised Brasco of his constitutional rights and told him

* Doherty had a diary entry showing "12:00 Cong Brasco Rotunda" for November 15, 1968 (GX 37A3); Brasco called a witness who said he had flown back to New York from Washington with Brasco on the afternoon of November 14, 1968 (Tr. 2100; DX AR).

** Masiello did not tell the Government his side of the story until September, 1973. The indictment was returned about six weeks later after a grand jury investigation in this District (Tr. 1631).

that they wished to discuss his relationship with A.N.R., Joseph Doherty and Joseph Weiner and any steps he may have taken to obtain Post Office contracts or a loan for A.N.R., including an allegation that Brasco was to receive one-half of a fee payable in connection with obtaining the loan (Tr. 1745-47).

Brasco replied that he would prefer to talk directly to the attorneys handling the investigation at the U. S. Attorney's office in Baltimore. Brasco did tell the agents, however, that although he knew Joseph Doherty "the name Joseph Weiner was unfamiliar to him" (Tr. 749).

The agents returned to Brasco's office on December 15, 1970, Brasco having decided to be interviewed by them after all (Tr. 2232-2233). Brasco was again advised of the purpose of the interview, and of his constitutional rights (Tr. 750-51). Brasco signed a waiver of rights form and agreed to answer questions, but declined to be placed under oath (Tr. 752). The agents then interviewed Brasco for between one and one-half and two hours (Tr. 754).

On December 17, 1970, the agents returned to Brasco's office with a typewritten statement for him to review (GX 56). During the course of forty-five minutes to an hour, Brasco reviewed the statement and made certain changes (Tr. 754-57). Most significantly, the statement prepared by the agents reflecting what Brasco told them on December 15 referred to Masiello's first contact with Frank Brasco as "some time in 1967 or 1968, exact date not recalled." (GX 56; Tr. 826). Brasco changed the reference to "some time in early 1968, exact date not recalled."

On December 18, 1970, the agents returned with a final version of the statement incorporating the changes, and

Brasco read and signed the statement (Tr. 758; GX 57). The statement, in pertinent part, reads as follows: *

At no time have I or my law firms ever represented John Masiello or the ANR Leasing Corporation (ANR) in any manner.

The first contact I had with the ANR was when a member of my staff received a telephone call from an unrecalled individual, some time in early 1968, exact date not recalled, who requested an appointment regarding ANR. One Saturday shortly thereafter I met Mr. Masiello at my East New York District office. He said that ANR had held contracts with the Government for some twelve years. He also stated that bids had been submitted for a new contract and one of the bidders, I believe it was the number two lowest bidder, had no equipment and was just a shell company which was not able to perform under the contract. He stated ANR had filed a complaint with the P.O. and asked that I check on and follow the actions the P.O. took on the matter. As I recall ANR was not the low bidder. Masiello was in my office for about five minutes. This is the first time I had ever met Masiello and in fact I had never heard of him prior to this.

Subsequently, Frank Kilroy, my Administrative Assistant, contacted someone in the P.O., regarding this matter. Subsequently Joe Doherty became involved. As I recall I telephoned Doherty at his office and he informed me that there was a complaint on file at the P.O. made by ANR about the matter. I do not think that I was ever in Doherty's office to

* During the course of the interview on December 15, Brasco also told the agents that he had an uncle named Joseph Brasco who was retired and lived on Long Island (Tr. 762-63). Frank Brasco conceded at the trial that he did not tell the agents that Joseph Brasco had sent Masiello to see him (Tr. 2464).

discuss anything pertaining to ANR. Doherty has been in my office on various occasions when we spoke on many subjects, politics, P.O. business and most likely Doherty talked with me concerning ANR's complaint as I or my staff would receive telephone calls from ANR to see what action was being taken by the P.O. and in turn I or my staff would telephonically contact Doherty.

I was introduced to a Joseph Weiner, "a big fat guy", and to the best of my recollection the introduction was at the Democratic Club in the Congressional Hotel. They were both drinking when I was introduced to Weiner.

I recall having told Doherty that ANR was in financial trouble as ANR representatives, had conveyed this information to me during the telephone calls I received from them. I cannot ever recall any conversations with Doherty and Weiner concerning the possibility of obtaining financing for ANR. I did know that Weiner was a financial man of some type and I heard Doherty and Weiner discussing some deals about financing buildings in Baltimore, Maryland.

I do not recall any meeting at either my Washington, D. C., or New York City offices during which Doherty and Weiner were present at the same time. I had seen them on several occasions and on a couple of occasions Doherty was in my inner office with me in the Longworth Building while Weiner stayed in the outer office. I do not recall any meeting in my New York City office at which Doherty, Weiner and Masiello were present to discuss any arrangements for securing financing for ANR. I have no knowledge as to whether Weiner made any attempts to arrange financing for ANR and if there were any such arrangements they were between Weiner and ANR.

At no time did I ever have any discussions with Doherty and Weiner concerning a fee for arranging financing for ANR or about splitting the fee so I would receive any part thereof.

I have no recollection of ever furnishing any ANR financial statements to Weiner and I don't recall any conversations during which Weiner informed Doherty or me concerning his attempts to secure financing for ANR.

I have no knowledge of the Terrace Trucking Company in connection with any P.O. contract and in fact never heard of the organization.

I have no recollection of having received any letter signed by a John Russo of the Washington Finance and Investment Company.

I do not recall ever meeting a Mr. Friedman whom I am told was Weiner's employer nor do I recall making any arrangements for Weiner and Friedman to meet Meade Esposito, whom I know to be the chairman of the Kings County, New York, Democratic organization or with Mr. Vanderveer, whom I know is an official of the Kings County Lafayette Trust Company.

One day my Administrative Assistant, Frank Kilroy, received a telephone call from Tim May, General Counsel of the P.O., who informed Kilroy that the P.O. had information concerning the unsavory background of Masiello and a Mr. McKeever an official of ANR. As soon as Kilroy brought this information to my attention I adopted a hands off attitude with respect to ANR and instructed my staff to do likewise.

At no time have I ever received any fees or political contributions from ANR and I have never contacted any financial institutions on behalf of ANR.

I authorize both agents the opportunity to speak to my staff on this matter if they desire. (GX 57; Italicized portion was handwritten by Congressman Brasco).

The Defense Case

The defense Frank Brasco sought to advance was that his only connection with Masiello had been in the role of a Congressman legitimately responding to an inquiry, and that any Government witness who suggested otherwise was a liar.

Frank Brasco

Masiello, Doherty and Weiner had, among them, testified to four meetings between Masiello and Frank Brasco: one in Brasco's Washington, D.C. office in June, 1967, at which Masiello met Brasco and asked for help getting the Post Office contract; a second at Brasco's Brooklyn storefront office in the fall of 1967, at which Doherty coached Masiello on what to bid; a third, at Frank Brasco's home in March, 1968, at which Doherty advised Masiello how to resolve his "mileage" problem; and a fourth, in Frank Brasco's Manhattan law office in early April, 1968, at which Frank Brasco, Masiello, Weiner and Doherty discussed the proposed loan for A.N.R. Frank Brasco denied that any of these meetings had ever taken place.

a. Brasco's version of what he did in 1967.

Brasco denied any participation in or even awareness of the throwing out of the bids in the summer of 1967 and the efforts made to assist Masiello in winning the fall, 1967 rebid. Brasco said that he had met Masiello only once, for five minutes, in Brasco's Brooklyn storefront office, on an occasion when Masiello came in to complain that the one or two bidders who had come in below him on a new Post Office bidding were "low balling" Masiello, in that they

had no equipment and could not perform under the contract.* Masiello, whom Brasco had never heard of before but who appeared to Brasco to be "a man of great solvency and respectability" (Tr. 2382-83), said that he had been providing the Post Office good service for twelve years, and asked Brasco to look into the matter (Tr. 2226, 2382-84).

Brasco had given essentially the same version of a single meeting with Masiello in his statement to the FBI agents in 1970 and, as noted above, had told them that the meeting was in "1967 or 1968", only to change their prepared statement to that effect to "early 1968".

Brasco's testimony at the two trials on the subject of when this meeting took place and why he changed the FBI statement was a jumble of inconsistencies. In his direct testimony at the first trial, he said the meeting had been "late in June, middle of June, late in June", 1967 (Tr. 2368-69). Twice later, in early stages of his first trial cross-examination, Brasco testified that he "believed", to the "best of his recollection" that the meeting was in mid-June, 1967 (Tr. 2372-73). Then still later in his first trial cross-examination, Brasco suddenly changed his testimony, saying that he had no memory at all as to when the meeting was, except that it had to have been sometime before October

* The force of Brasco's assertion that he had met Masiello only once was marred by several slips of the tongue. Thus in cross-examination at the first trial Brasco had several times referred to his "first" meeting and "initial" meeting with Masiello, finally conceding that there "may have been" more than one meeting and asserting that "I could not honestly say that there was or there was not (Tr. 2443-44). At the second trial Brasco's backbone, if not his memory, was stronger. He stated flatly on cross-examination "I met him once" (Tr. 2443) and then, when reminded of his first trial equivocating replied "As I sit here now, Mr. Shaw, there is no recollection of any other meeting whatsoever. Therefore, there was no other meeting . . . "Q. Are you stating positively that you only met John Masiello once? A. Yes, sir." (Tr. 2445-46).

3, 1967, the date on which the Frank Brasco telephone bills received into evidence first show a call to Masiello.*

At the second trial Brasco continued to maintain that he had no recollection as to when the meeting took place. A former Assistant District Attorney and Legal Aid lawyer who acknowledged having himself prepared witnesses to testify at trials, Brasco claimed that he had been "guessing" under oath when he told the first trial jury three times that the meeting he claimed to have attended with Masiello in Brooklyn took place in middle or late June of 1967 (Tr. 2370-71).

Pressed at the first trial to explain why he had changed the date of his meeting with Masiello before signing the FBI statement in 1970, Brasco had given these answers:**

"Q. I want you to look at Government's Exhibit 56, Mr. Brasco. I want you to look at the last paragraph on the bottom of the first page.

"Do you see where some of those handwritten corrections are?

A. Yes.

"Q. Now, the statement they brought to you on the 17th, which they had typed up, said that the call which you received in your Brooklyn office came

* Between the first and second trials, the Government located some July and August 1967 telephone billing records for Masiello in FBI files, which showed calls to Brasco's Washington office from an unlisted Masiello number. Frank Brasco's own office telephone records were found to contain a July, 1967 call to that same number. However the trial court excluded these records on the theory that the defense was prejudiced by not having Masiello available to cross-examine about the calls which they reflected (Tr. 2484-2516).

** The Government offered this portion of Frank Brasco's first trial testimony on its direct case (Tr. 853-55). The other portions of Brasco's first trial testimony referred to in this Statement of Facts were acknowledged by Brasco during cross-examination at the second trial.

'Sometime in 1967 or 1968, the exact date not recalled,' did it not?

A. It did before it was crossed out, yes, sir.

"Q. And you crossed it out, did you not?

A. Yes, sir.

"Q. And you changed it to read, 'Sometime in early 1968,' did you not?

A. Yes, sir.

"Q. Go ahead, tell us why you made it?

A. I made the change because I wasn't sure of the date. I had spoken to my staff and I became more confused than before I spoke to them and that is why I recommended to the agents, as I said before, that they should speak to the staff to see if they could get a better recollection than I could. I offered—they were in the office with the staff.

"Q. Your testimony here is that you changed the words '1967 or 1968' to read 'early '68' because you were confused as to what the date actually was?

A. I said yes, I have no independent recollection of the date, yes, sir.

"Q. Well, then, why, sir, did you narrow the possible time when this took place rather than expanding it. Do you understand my question?

A. I understand your question, sir.

"Q. Well, what is the answer, Mr. Brasco?

A. I just have no recollection of the date and that was the thing that I did at the time.

"Q. Well, why did you put down something more precise as to the date if, as you say, you had no memory as to when it happened?

A. Well, I don't know that it was more precise. I just know that I changed it. I had no recall as to dates and again I offered the agents to speak to my staff to see whether or not they could get better dates."

At the second trial, apparently understanding that his first trial explanation was nonsense, Frank Brasco for the

first time claimed that he made the change because one of the FBI agents interviewing him told Brasco that he wanted something more precise than "1967 or 1968" (Tr. 2478).*

According to Frank Brasco, shortly after Masiello came to see him, he asked Joseph Doherty to look into Masiello's complaint (Tr. 2389). By this time, Brasco said, his uncle had told him that he, Joseph Brasco, had prompted Masiello's visit,** and that he knew Masiello from his own days as a trucker and recommended that Frank Brasco should do whatever he could for Masiello (Tr. 2415-16).

As Frank Brasco put it:

"What appealed to me very simply, if a man had been working for the Government for some ten or twelve years, and as he had indicated to me, he never had a complaint against him, and that other people who were bidding could not perform the services he was performing for that 10 or 12 years, I believe I would take a look into it again" (Tr. 2386).

* Brasco of course testified at the trial that his inability to give details to the agents (see the text of his statement, GX 57, *supra* and pp. 44-47) was the result of memory loss between 1098 and 1970, and not of deliberate obfuscation (Tr. 2477). However, Brasco had to concede that although he knew his own alleged criminality was under investigation, he never tried to refresh his memory during the week between the FBI's first two visits by either talking to his Uncle Joseph about the A.N.R. events or asking the Post Office to supply him with information from their files (Tr. 2462-66). As to the latter, although he had professed in a letter to George Beall on December 8, 1970, his "full and complete cooperation in any way I can" (DX AL; Tr. 2332). Congressman Brasco informed the jury that, "I didn't think that I had to help the FBI to get records from the Post Office Department if they wanted them" (Tr. 2466).

** According to Frank Brasco, Masiello had not told Brasco at their one and only meeting that it was Frank Brasco's uncle Joseph Brasco, who had suggested to Masiello that he see the Congressman (Tr. 2378).

Thus, on the one hand, Brasco portrayed himself as a dutiful Congressman on the Post Office Committee anxious to right a possible wrong for a contractor who was not even a constituent. On the other hand, however, Brasco maintained that he had had virtually no connection whatsoever with the resolution of the problem which Masiello had posed. Thus, Brasco claimed that (i) he never found out during 1967 whether or not Masiello was going to get the Post Office contract (Tr. 2421); (ii) he never even asked Doherty what had happened to Masiello's problem even though they spoke with each other "very frequently" in late 1967 (Tr. 2421-22); (iii) despite his many conversations with Doherty and his at least seven telephone conversations with Masiello in October and November, 1967, he was never told by them or anyone else that the lowest bidder on the contract had been found qualified by both the New York Postmaster and the Regional Office (Tr. 2403); (iv) despite the fact that he spoke with Masiello twice by telephone on October 3 and October 4, 1967, one week before Masiello put in his October, 1967 rebid, neither Masiello nor Doherty nor anyone else ever told Brasco that the Post Office had thrown out all the bids on the contract and was permitting Masiello to rebid (Tr. 2394-95); (v) Brasco never even asked Masiello, in the October 3 and October 4 calls, whether Masiello's problem with the Post Office had been solved, and Masiello never even told him that he was about to rebid (Tr. 2395-96, 2399);* and (vi) during a total of five telephone conversations with Masiello on November 4, 8, 9, 15 and 20, 1967, Brasco never asked Masiello how he stood with the Post Office and Masiello never told Brasco that he had put in a new bid, that he was still not the low bidder, or that the low bidder had again been

* According to Brasco, in the October 3 and 4, 1967 phone calls Masiello merely told Brasco "what a great company he had" and asked Brasco "to pass that information on to the Post Office" (Tr. 2395).

found qualified by the New York City and Regional Office of the Post Office Department (Tr. 2400-01).*

b. Brasco's version of what he did from January through May, 1967.

As indicated in "The Government's Case", *supra* at pp., Frank Brasco steadfastly maintained that he never spoke with anyone about getting a loan for A.N.R. or Brasco not only denied having the meetings and conversations to which Masiello, Doherty and Weiner testified, but about the renewal of A.N.R.'s Post Office contract. Thus, also swore that he never said any of the things which Timothy May (Tr. 2686-8), Harry Kagan (Tr. 2544-7), Amos Coffman (Tr. 2672 and 2675), and Daniel Himmel (Tr. 2583-6) attributed to him (see pages 24-26, 28-29, 33-34, *supra*), and dismissed as incorrect a contemporaneous Post Office memorandum which said that Brasco had called the Post Office on May 24, 1968 to inquire about the renewal of A.N.R.'s contract (Tr. 2290; GX 47C, see page 29, *supra*).

These denials left Brasco with a good many telephone calls to explain. He was unable to explain why he called Joseph Weiner's New York office number on April 4, 1968, four days before Weiner and Doherty said that they believed their meeting with Masiello and Frank Brasco at Brasco's Manhattan law office took place (GX 91; Tr. 2527). With respect to a call from Doherty's office to his office on April 5, 1968, Brasco maintained that the call related to legislation having to do with assaults on letter carriers (GX 39A; Tr. 2528-29). When asked why Doherty, who was a Con-

* According to Brasco, in the five November calls Masiello merely made some vague request for information about the "status" of his relationship with the Post Office (Tr. 2400). As indicated *supra*, at pp. 15-16, two of the Brasco-Masiello November calls came on the day before and the day on which Postal Official Seth Brewer changed an earlier draft memo to the New York Post Office from an instruction to award the contract to Lehigh, the low bidder, to an instruction to refer Lehigh's bid to the SBA.

gressional liaison official in the *Bureau of Facilities*, would have been consulted on such a problem, Brasco said that Doherty was the New York advance man for the Hubert Humphrey Presidential campaign, and as such was somehow vitally concerned with the security of federal employees (Tr. 2530-33, 2802-04). This explanation for the April 5 call was given for the first time by Brasco in the second trial, after Doherty had left the stand, and thus the jury had only Brasco's word for the surprising proposition that Joseph Doherty, still a Post Office official on April 5, 1968, was already active as an advance man for Hubert Humphrey's Presidential campaign only five days after President Johnson had announced to a surprised nation that he would not run for re-election (Tr. 2864-65).

With respect to three calls, shown on his bills, to "Weiner" in "Baltimore, Maryland" on May 28, June 12 and June 20, 1968, Brasco had conceded at the first trial that these were calls to the Joseph Weiner in this case (Tr. 2558, 2564). Thus, with respect to the May 28, 1968 call (the date on which Doherty's testimony was that he had met with Brasco to discuss with him Timothy May's decision to cancel A.N.R.'s contract), Frank Brasco had maintained at the first trial that he had really been trying to get ahold of *Doherty* when the call was placed to "Weiner". Presumably having concluded by the time of the second trial that there would have been no reason to place a person-to-person call to "Weiner" if he was really trying to talk to Doherty, Brasco changed his testimony at the second trial and said that he simply did not recall whether the May 28, June 12 and June 20 calls were to Joseph Weiner or some other Weiner (Tr. 2557-58, 2562).*

* Further muddying the waters, Brasco announced for the first time on *redirect* examination in the *second* trial that he really had tried to call Doherty by making a person to person call to "Weiner" in late May, 1968, as he had said at the first trial, but that his first trial testimony that the call had been on May 28 had been an "obvious mistake" and the call really had occurred on May 24, 1968 (Tr. 2812-16, 2872-77).

With respect to calls, shown on his bill, to John Masiello on May 14, May 21, May 22 and the same May 28 (GX 91), Brasco claimed that the calls had to do with Masiello's mileage problem (Tr. 2679-82). At the first trial, however, Brasco had flatly stated at one point that he had only discussed A.N.R.'s mileage problem with McKeever, and had never spoken on that subject at all with Masiello (Tr. 2679-2684).

As for the events surrounding the cancellation of A.N.R.'s contract, Brasco maintained that he first learned of the Masiellos' criminal records and alleged organized crime connections on Friday, May 31, 1968, from Timothy May (Tr. 2690). Thus Brasco denied that he had heard anything about Masiello during his tenure as an Assistant District Attorney and ultimately Assistant Chief of the Rackets Bureau in the Brooklyn District Attorney's Office from 1961 to 1966 (Tr. 2624), denied that he had seen Masiello's picture on the front page of the *Daily News* in December, 1964 in connection with his assertion of his Fifth Amendment privilege many times at a State Investigation Commission hearing (Tr. 2365, 2626-27); denied seeing a report published by the State Investigation Commission in 1965 referring to Masiello as an organized crime loan shark (Tr. 2632), denied reading in the *New York Post* and *New York Times* in December, 1967 that Masiello had taken the Fifth Amendment at another SIC investigation covering racketeering at Kennedy Airport (Tr. 2637), denied that his Uncle Joseph or anyone else ever told him that Masiello had been in jail as a result of a felony conviction (Tr. 2640), denied discussing John Masiello Jr.'s maiming arrest and John Masiello, Sr.'s alleged organized crime connections with Joseph Doherty as early as the fall of 1967 (Tr. 2640-41), and denied discussing with Joseph Doherty in the spring of 1968 that Thomas McKeever looked like a "hood" and

should no longer represent A.N.R. at the Post Office in Washington (Tr. 2655).*

Brasco also denied that he telephoned Timothy May at May's home on May 30, 1968,** and denied at any time tell-

* Brasco did admit, however, that he saw McKeever in his office in March, 1968, that he "might have" made arrangements for McKeever's hotel room (Tr. 2664), that he and McKeever and Doherty were at a Post Office cocktail party that night, and that they later had drinks together at Dankers (Tr. 2642-65).

** Brasco's contention that he talked with May about A.N.R. for the first and only time on the afternoon of Friday, May 31, 1968 represented his principal attack on Timothy May's credibility. Thus, Brasco called his assistant Frank Kilroy, a career Congressional aide, to testify that May had called him on the 31st to say that Brasco should "have nothing to do with [the A.N.R.] case, its a bad one" (Tr. 1973). According to Kilroy he immediately passed the message on to Brasco in New York (Tr. 1975), and according to Brasco, he immediately called May and was advised as to Masiello's record (Tr. 2242-5). Brasco and Kilroy relied on Brasco's telephone records, which showed a call to May's office on May 31, 1968, with no indication of the time, and also showed a call from Brasco's Washington office to his New York office at 3:58 p.m. (GX 91). Unfortunately for this carefully constructed defense, however, a memorandum prepared on May 31 by a New York City Postal official read as follows:

In accordance with instructions I waited for telephone message from [Timothy May's deputy] Mr. Di Lorenzo regarding A.N.R. Leasing. By 2:50 p.m., when no calls came, I contacted Mr. Di Lorenzo and he said he is scheduled to see Mr. May in 10 minutes and he would call.

At 3:30 p.m., I again called and was informed that Mr. Di Lorenzo was in with Mr. May. At 3:40 p.m., *Mr. Di Lorenzo called me and he said that Mr. May is talking to a Congressman now* and he would call me in a few minutes.

At 3:50 p.m., Mr. Di Lorenzo called and said O.K. to deliver the letter. (GX 47C; emphasis added).

Unless this carefully prepared (Tr. 607-8) contemporaneous memorandum was inaccurate, Kilroy and Brasco were wrong in claiming that GX 91's call from Brasco's Washington office to his New York office at 3:58 p.m. on May 31 was a call telling Brasco that he should call May, because Brasco and May were already on the

[Footnote continued on following page]

ing May that he did not know who the Masiellos and McKeever were, and was only inquiring about A.N.R. on behalf of some of its innocent creditors (Tr. 2686-8).

6. Brasco's version of what he did after May 31, 1968.

According to Brasco he did absolutely nothing on behalf of either Masiello or any of his companies after May 31, 1968. Thus he not only denied having any conversations with Weiner or Doherty about Masiello after May 31, but also claimed to have no recollection at all of the conversations to which Howard Cook and Douglas Nobles testified (Tr. 2592-3, 2885).*

telephone 18 minutes earlier at 3:40 p.m. Undaunted, Brasco called Di Lorenzo, and tried to jimmy out of him the concession that six years previously he had mistakenly believed that May had been talking to Brasco when he really was talking to Kilroy, and so had mistakenly advised the writer of GX 47C that May was talking to a "Congressman" at 3:40 p.m. (Tr. 2044-5, 2048-9, 2050-1).

This byzantine effort on Brasco's part to discredit May crumbled, however, when Brasco's lawyer showed GX 47C to Brasco on direct examination and carefully asked Brasco whether he was, in fact, talking to Timothy May at 3:40 on May 31, 1968. Brasco unhesitatingly answered "Yes, sir" (Tr. 2245), requiring that, the next day, Brasco's lawyer lamely go over the same ground and elicit the response that Brasco had been mistaken in saying "Yes, sir" and should have said "No, sir" (Tr. 2288).

* Brasco admitted mentioning A.N.R. to Postmaster General Marvin Watson in June 1968, but claimed that all he did was tell Watson of his embarrassment that no one had ever told him about Masiello's background (Tr. 2831, 2885).

ARGUMENT

POINT I

The trial judge properly denied Brasco's post-trial motion for a new trial based on allegations of juror misconduct.

On October 10, 1974, nearly three months after the verdict, Brasco moved for a new trial on the basis of affidavits alleging juror misconduct. Judge Cannella found all but one of the allegations in support of the motion insufficient, even if true, to warrant a new trial. As to one claim—that during the course of the trial several of the jurors had read an article in the New York Post relating to the refusal of a Government witness to testify—Judge Cannella held a hearing on October 19 and 21, 1974, at which ten of the jurors, defense counsel and a defense investigator testified. By memorandum opinion and order filed November 25, 1974, Judge Cannella denied Brasco's motion for a new trial.

A. The Facts

1. Post-trial interviews of jurors by Brasco's attorney and by Dominick Barbarino

Early in October, 1974, the Government discovered that persons on Brasco's behalf had, without any prior notice to the Court, been interviewing jurors who sat on the trial. On October 9, Judge Cannella signed an order directing Brasco to show cause why he and any others acting on his behalf should not be enjoined from any further interviews of jurors (A. 7).

At a conference with Judge Cannella on October 8 attended by Herbert Lyon, chief counsel for Brasco, and Government counsel, Mr. Lyon first tried to deny that he had

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talked to any of the jurors himself.* Then, confronted with the fact that he had interviewed one of the jurors, Ruth Robbins, at her vacation home on Shelter Island, Mr. Lyon falsely claimed that the meeting had been merely a coincidence (P.Tr. 6-7).** In fact it developed that Mr. Lyon had interviewed a total of four jurors (Juror Robbins and two others at her home), and a fourth juror, Marie Purpo,

* "[The Court:] . . . What was done, Mr. Lyon? Anything under your supervision.

Mr. Lyon: *No, Your Honor.* Apparently there was——

The Court: Well, apparently some people did talk to the jurors. Are you aware of who they are?

Mr. Lyon: I am *now*, surely". (p. 2, emphasis added)

** "[The Court:] I don't know why this fellow has been going around doing this.

Mr. Shaw: Mr. Lyon has been doing it. He might explain that.

Mr. Lyon: It's not strictly true. As a matter of fact, it's not true at all. I met Mrs. Robbins on Shelter Island. Mrs. Robbins invited me to her house. She said there would be two people there. One was a juror; one was an alternate. We had a friendly discussion. There was no interviewing, and I took no notes. It's not the basis of any motion.

Mr. Shaw: Excuse me. Perhaps I can ask how Mr. Lyon happened to meet Mrs. Robbins on Shelter Island.

Mr. Lyon: Shelter Island is a public place. I was walking on Shelter Island. I went to look at some property. Mrs. Robbins saw me and said, 'Mr. Lyon, what are you doing here?' I said I was looking at property and she asked if I would come in and have a drink.

Mr. Shaw: Mr. Lyon, I don't want you to go any further. You have been a friendly adversary, but I have interviewed a real estate agent on Shelter Island to whom Mr. Lyon went asking where Mrs. Robbins lived, asking if there was any real estate and finding out that some was near Mrs. Robbins' home, was driven there, got out of the car and went up, saw Mrs. Robbins, and Mrs. Robbins graciously invited him for a drink. But Mr. Lyon's suggestion that it was an accidental meeting isn't accurate, and he oughtn't to do that.

Mr. Lyon: As long as I do not conduct an interview, there was no inquiry by me of Mrs. Robbins. There was a discussion. She is not the basis of any motion——." (P.Tr. pp. 6 and 7)

on September 18, 1974, at Mr. Lyon's home late in the evening (P.Tr. 32). In addition, an ex-policeman named Dominick Barbarino, who was a friend of Brasco and claimed to be dismayed at the jury's guilty verdict in the face of evidence which "overwhelmingly showed [Brasco] to be innocent" (Barbarino affidavit, p. 1), interviewed a total of six jurors between the conclusion of the trial on July 19, 1974, and the beginning of October, 1974. Five of the jurors were interviewed in person and one by telephone; seven conversations with five of the jurors were surreptitiously tape-recorded by Barbarino.

Marie Purpo, with whom Mr. Lyon spent several hours on September 18th, had previously that evening spent two and one half to three hours being interviewed by Barbarino at her home (P.Tr. 46). As Miss Purpo explained at a hearing held by Judge Cannella on October 19, 1974, Barbarino's pitch was not particularly subtle:

"Q. Tell us what you remember Mr. Barbarino saying to you on the subject of Mr. Brasco and the verdict in the case. A. 'It was a shame that such a good man was found guilty for things that he didn't do, and he has a wife and four beautiful children, and a home out in Brooklyn.' And then he went on. I don't remember specifically what else.

Q. Can you give his Honor your best approximation of how long statements by Mr. Barbarino in that area continued when he came to your home on that Friday night? You say it went on. How long did that kind of talk go on? A. He was at my house approximately two and a half hours to three. And I would say it went on at least half, half the time that he was there, constantly bringing it up."

Barbarino went all the way to Wayne County, Pennsylvania on his friendly mission to interview Donald Fine, a juror who was a schoolteacher. Barbarino buttered Fine

up by telling Fine that he knew Fine to be "a teacher and a humanitarian" (P.Tr. 178).^{*} Barbarino also told Fine that

"... he and Mr. Brasco and Mr. Brasco's associates were very interested in education. He then said that since the central school board in the City of New York was going to be extended to seven members that a friend of his, and Mr. Brasco and their associates was going to be appointed to this board."

The Trial Court excluded all other efforts by the Government to explore the manner in which Brasco's agents sought to question the jurors and the participation of Brasco and Mr. Lyon in causing the interviews to take place, noting that the grand jury was available to the Government for that purpose (P.Tr. 218).

2. The New York Post incident

The jury was sequestered throughout the four week trial and stayed in Marshal's custody at a New York motel.

Juror Edward Hutton said that around 8:00 or 9:00 one evening during the trial, while he was reading a New York Post in the "recreation room" at the juror's motel, he noticed an article with a headline to the effect that a "stand-in witness" was testifying for a "reputed Mafia figure." (P. Tr. 57-58) At the time, John Masiello's testimony from the first trial was being read into the record with a Government attorney playing Masiello's part. Hutton saw Masiello's name in the article and deliberately avoided reading the article (P. Tr. 59, 74). The article, identified by Hut-

^{*} Similarly, Barbarino visited alternate juror Israel Cohen in Lake Carmel, New York, whom he had decided to "look up" on his way back from Ten Mile River Boy Scout Camp. (Barbarino Affidavit, p. 2)

ton at the hearing from its headline, is reproduced in a footnote below.*

* New York Post, Tuesday, July 2, 1974, p. 22.

A STAND-IN TESTIFIES FOR MOB FIGURE

The "witness" appeared impassive on the stand, looking neither at the jury nor at the man he was accusing. His eyes never shifted from the sheets of paper in front of him; his voice was a steady monotone, with no hint of anxiety.

"Is this your signature?" the prosecutor asked sternly.

He did not look at the exhibit held before him.

"Yes, it is," he said, with no expression.

It was not his signature, however, and everyone in the courtroom, including the judge, the jury and the man on trial, knew it. The man giving testimony was a "dummy witness," standing in for a reluctant government informer in the influence-peddling trial of Rep. Frank J. Brasco.

Yesterday, as the Brooklyn Democrat's second trial continued in federal court, reputed mobster John A. (Gentleman John) Masiello, who has refused to testify despite an offer of immunity, was replaced by a court aide who read from the record of Brasco's first trial.

No 'Gestures or Inflections'

He was instructed by Judge John M. Cannella to "employ no gestures or inflections" in reading the court record. As the prosecutor, U. S. Attorney Edward M. Shaw read the questions he had aimed at Masiello during Brasco's first trial—which ended in a hung jury in February—the dummy witness responded, often stumbling over unfamiliar names and occasionally failing to respond completely.

Masiello, who is serving a seven-year term at the Federal Prison Farm in Allenwood, Pa., was the most damaging witness in Brasco's first trial, where he testified after a promise of immunity from the court.

But he refused to testify last week, saying he felt his appearance on the stand would endanger the life of his wife, who has recently been ill.

Judge Cannella assured the jury yesterday that a reading of Masiello's original testimony was "proper evidence" since the new case was based on identical charges.

[Footnote continued on following page]

Hutton told other jurors who were with him in the recreation room, that

"the Marshals had neglected to extract that article*, how stupid it was because they were supposed to take out any articles obviously related to the case . . ."
(P.Tr. 59-60).

His best recollection was that there were "maybe three" other jurors in the room at the time (P.Tr. 69-70).**

Hutton was not sure whether juror Marie Purpo was in the room at the time. Hutton testified that Miss Purpo did not read the article, unless she was able to do so from behind his shoulder when he called the attention of jurors to it. (P.Tr. 60-67).

Nothing Unusual . . .

In the testimony read yesterday, Masiello claimed that Brasco, then a member of the House Postoffice Committee, obtained Postal Service trucking contracts for him in return for a \$10,000 bribe paid to Brasco's uncle, Joseph. The contracts were terminated after Manhattan postal officials learned of Masiello's reputed affiliation with the Vito Genovese crime family.

The defense contends Brasco did no more to aid Masiello than he would have done for any constituent who came to him for help, and that no bribe was ever paid.

* (b) The jury, while sequestered, shall be permitted to read current printed news media which shall be provided to them by the Marshal, which materials the Marshal shall have deleted all references to this trial and all other newspaper or magazine articles relating in any way to crime, civil or criminal litigation, or any stories, articles or items concerning or dealing with matters of national, statewide or local politics, for example, but not limited to, "Watergate" and all investigations, inquiries and proceedings with regard thereto; or political campaigns and elections, as well as all paid political or campaign advertising, that in any way relate to or involve the defendant and that the jurors be advised that such materials have been deleted.

** Hutton said that the jurors who might have been present were Eric Benjamin, Carmen Rivera, and Marie Purpo. (P.Tr. 70)

About twenty minutes after he found the article, Hutton tore the article out of the paper and "tore it up into little pieces and threw it in the garbage" (P.Tr. 62, 73). His recollection was that the paper was in his possession during the entire twenty minutes (P. Tr. 73).

Hutton had no recollection of mentioning the incident to any of the marshals but may have related what happened to other jurors the next day (P.Tr. 77-78). He was sure that at some point he told one juror, Ruth Robbins, about finding the article, and that she told him he had done a "noble thing" in destroying the article without reading it (P.Tr. 70, 80).

Juror Marie Purpo testified that "late" one night during the trial, in the jurors "recreation room", Juror Hutton showed her a copy of either the New York Post or the Daily News, and told her the article "dealt with the [Brasco] case". (P. Tr. 14-16, 18). She testified that she saw the headline and first paragraph of the article from behind Hutton's shoulder, and was aware that the "article dealt with Mr. Masiello's not appearing in court" (P.Tr. 18, 26-27). However, Miss Purpo did not read the article and was not told by Hutton or anyone else that the article related that Masiello was alleged to have refused to testify because of concern for his wife's health (P.Tr. 16, 22-23).

According to Miss Purpo, either she or Hutton flushed the newspaper down the toilet shortly after the article was discovered (P.Tr. 22, 24). The next morning Miss Purpo said, she and Hutton told Deputy Marshal Bob White about the incident, asking him to be more careful in clipping the newspapers (P.Tr. 25-26).

Finally, Miss Purpo testified that she never told Barbarino or anyone else that she had learned from a newspaper article that Masiello had declined to testify because of fear for his wife's health (P.Tr. 23).

Several other jurors also testified at the hearing.

Gloria Chiang testified that Marie Purpo had told her that there was "Something in the newspaper that should not have been there." "Something about Masiello, or something like that. . . ." (P.Tr. 97) And in answer to the Court's inquiry, "Did she tell you the contents of the article in any way?" Miss Chiang answered, "No."

Eric Benjamin had "no immediate recollection" of the Hutton incident. He testified that he did have a "vague recollection that he (Hutton) reported it to a marshal. (P.Tr. 106) When shown DX 1A and asked if he had ever seen it, if it was ever called to his attention or if he ever read it, his answer in each case was, "No." (P.Tr. 107)

Carmen Rivera testified that she was present when Hutton found the article. She stated that "He just said there was an article on (sic) the paper pertaining to the trial." (P.Tr. 115) According to Miss Rivera, Hutton showed the article to Marie Purpo, who took the paper from his hand, looked at it, then returned it to Hutton—who immediately tore it up. (P.Tr. 114-115) Rivera further testified that she did not look at the article (P.Tr. 114), and in answer to the question: "Do you have any way that you could identify the article? In other words, did anybody tell you what the headline was or anything like that?" she answered, "No." (P.Tr. 118)

Juror Allen Rambach testified that he recalled Hutton finding a newspaper article and saying, "Hey look there's something here about the case that should have been cut out." Rambach could not recall what the article was about however and did not remember any article that was supposed to be about Masiello. (P.Tr. 272-273)

Ruth Robbins testified that Hutton told her he had seen the article and had thrown it away, but that she had no knowledge of what was in the article. (P.Tr. 265)

Three other jurors, Marjorie Hall, Larole Lazarou and Donald Fine, also testified at the hearing. Each of them indicated they knew nothing of the newspaper incident. (P.Tr. 103-104, 269-270, 123).

Brasco's friend Dominick Barbarino, when called by the Government the first day of the hearing, refused to testify on Fifth Amendment grounds * (P.Tr. 149-151). Then on October 21, 1974, Barbarino was called by Brasco. Barbarino testified that he interviewed Juror Purpo at her home on the evening of September 18, 1974. According to Barbarino, Purpo told him that she had been shown by Juror Hutton, during the trial, a newspaper article in which she read "that John Masiello had refused to testify because he feared for the life of his wife." (P.Tr. 201, 229-30). According to Barbarino, Purpo also told her that Hutton had read the entire article and that they had thereafter "got-ten scared" and flushed the article down the toilet (P.Tr. 201).

On cross examination, Barbarino admitted that in a conversation with Purpo which he secretly tape-recorded on September 30, 1974, Barbarino said to her, "Wasn't there something in that article about [Masiello] not testifying because he feared for the life of his wife" and Purpo replied, "I did not read it" (P.Tr. 232-236).

Herbert Lyon and William Erlbaum, both attorneys for Brasco, testified that Juror Purpo said, on the evening she was brought by Barbarino to Lyon's home, that she had, during the trial, seen an article which said that Masiello did not testify because he feared for his wife's life (P.Tr. 328-29, 357-61). Although Herbert Lyon testified at the

* At a hearing on October 16, 1974 before Judge Cannella the Government put on the record that it had subpoenaed Barbarino as the target of a grand jury investigation. (P.Tr. Hearing October 16, 1974 at p. 11)

hearing that when he heard Miss Purpo's remarks he believed them to be of "extraordinary significance" with respect to a possible new trial motion, neither attorney asked Miss Purpo to provide this information in a signed statement, and neither attorney even made a memorandum of it (P.Tr. 332-333, 373-374). Indeed Mr. Lyon conceded that when one of the Government prosecutors called him before the post-trial hearing began to ask which jurors had been interviewed, Mr. Lyon mentioned jurors Robbins, Hutton, and one alternate, and "forgot" to mention Juror Purpo, after which Lyon called back to correct his omission (P.Tr. 343).*

In his memorandum opinion and order denying the motion, the trial court credited the statements of jurors Hutton and Purpo that they had not read the article, were not affected by it, and were not prejudiced toward the defendant. The Court found no showing of prejudice whatsoever by Brasco arising from the newspaper article incident.

B. This Court should not consider Brasco's claims

While, as the District Court did, we reach the merits of Brasco's contentions regarding misconduct by the members of the jury, we believe that there are substantial grounds for a refusal by this Court to consider them at all.

* Further, on October 8, 1974, at a hearing before Judge Cannella, Lyon stated to the Court:

But Miss Purpo came, and she said that in the recreation room, when they saw a newspaper, that there had been an article about the Brasco case that had not been censored. Now, *I didn't know which article it was*, and this was more of a social conversation than anything else, and *I didn't do anything further about it*. But Mr. Barbarino tells me that he then went and dug out all the articles and asked her to identify it. (Hearing October 8, 1974, p. 5; see also P.Tr. 345) (emphasis supplied).

The conduct of the defense, detailed *supra*, establishes that the methods by which this purported misconduct by the jury was discovered were of the most doubtful character, as Judge Cannella noted in his opinion denying Brasco's new trial motion, *United States v. Brasco*, 385 F. Supp. 966, at 969-70, n.5 (S.D.N.Y. 1974). See also *United States v. Sanchez*, 380 F. Supp. 1260, 1265-66 and n.12 (N.D. Tex. 1973). *United States v. Driscoll*, 276 F. Supp. 333 (S.D.N.Y. 1967) (McLean, J.). Cf. *Miller v. United States*, 403 F.2d 77 (2d Cir. 1968) (Friendly, C.J.). The kind of post-trial interrogation of the jurors which occurred here, known to and even engaged in by defense counsel, should not be dignified or encouraged by adjudication by this Court of their fruit. The same reasons which underlie the exclusionary rule for the products of Constitutional violations by government agents, *Weeks v. United States*, 232 U.S. 383, 391-392 (1914), suggest that what occurred in securing the information now relied on by Brasco should foreclose its use. To hold otherwise would put a premium on conduct which has no place in the judicial process.

C. The violations of the sequestration order

Brasco claims, on the basis of his interviews of seven of the jurors and one of the alternate jurors after the trial,* that there were assorted violations of the sequestration order during the trial, including unmonitored telephone calls and home visits by the jurors, excessive indulgence in liquor, and the reading of a newspaper clipping relating to the trial by one of the jurors. The trial judge held a hearing

* One of the seven jurors, Axel Barthelson, was excused before deliberations. An eighth juror, Edward Hutton, was also approached for an interview by Barbarino and Mullen, an investigator employed by the defense during the trial. (P.Tr. 89-91) Apparently Hutton was also one of the two jurors present at juror Robbins home on Shelter Island on the occasion defense counsel engaged them all in a "friendly discussion." (Hearing, October 8, 1974, p. 6; P.Tr. 88)

at which he permitted inquiry about the alleged reading of the clipping, but he declined to take evidence on the other claims, holding that the allegations made out no more than violations of the sequestration order without a showing of "one scintilla of prejudice inuring to the defendant as a result." *United States v. Brasco*, *supra*, 385 F. Supp. at 969. While Brasco attacks the trial judge's determination and his refusal to hold a hearing on all but one of his allegations, the trial judge was clearly correct in his decision.

The law is settled that a showing of an unauthorized communication by a third party with a juror "during a trial about the matter pending before the jury" is presumed prejudicial and is grounds for a new trial unless the Government can establish at a hearing "that such contact with the juror was harmless to the defendant." *Remmer v. United States*, 347 U.S. 227, 229 (1954). It is equally plain that none of the contentions made in the affidavits submitted by Brasco's investigator Barbarino and alternate juror Cohen in any way suggest that any of the communications alleged to be violations of the sequestration order (save that regarding the newspaper article) involved anything touching upon the Brasco trial.

Brasco nevertheless argues, relying on the Ninth Circuit case of *Cavness v. United States*, 187 F.2d 719 (9th Cir.), *cert. denied*, 341 U.S. 951 (1951), that a mere showing of violation of a sequestration order puts the Government to proving that the contacts arising from the violation did not prejudice the defendant. However, Brasco's arguments fail to note that the discussion in *Cavness* was predicated on a separation by a juror from a jury not merely sequestered, but actually in deliberations. *Id.* at 723. Further, the holdings in *Cavness* and such other cases relied on by Brasco from the Seventh Circuit as *United States v. Panczko*, 353 F.2d 676 (7th Cir.), *cert. denied*, 383 U.S. 935 (1966) and *United States v. D'Antonio*, 342 F.2d 667 (1965), depend on that Circuit's view that a jury may not be separated once the case has been submitted to it, a view which has not

been accepted by this Court. *United States v. Breland*, 376 F.2d 721, 723 (2d Cir. 1967). There is no *per se* rule in this Circuit that violations of a sequestration order of the type alleged here—even when the jury is deliberating—are sufficient of themselves to require a new trial without a showing of prejudice. *United States v. Berger*, 433 F.2d 680, 686 (2d Cir.), *cert. denied* 401 U.S. 962 (1971).

The final string to Brasco's bow is that he should have a hearing at which "the government should be required to account for every instance of unauthorized separation resulting in contact between jurors and non-jurors; to prove what newspapers or news radiocasts [sic] relating to the trial were published during the time the two jurors had unsupervised home visits; and to affirmatively demonstrate that all of the unauthorized contact was 'harmless to the defendant.'" (Br. at 57-58). Naturally, the proof which Brasco demands regarding media coverage of his case would be impossible to produce, and the claim is in any event utterly absurd.

Brasco's lawyers and investigators interviewed seven jurors and one alternate for no reason other than to impeach the verdict in this case. Despite their unrestricted interview of one of the two jurors who are claimed to have had unsupervised home visits, there is no suggestion in the affidavits submitted for the motion that during this visit the juror had any discussion with anyone about the subject matter of the trial. Similarly, despite alternate juror Cohen's affidavit that at the barbershop at Gimbel's two jurors "were permitted to read magazines they found available", there is no showing that there was anything in any magazine that any juror read in that barbershop having anything to do with the trial. Moreover, despite the allegation of unmonitored telephone calls by the jurors, there is no allegation that any of these calls ever included any discussion of the Brasco case. Here, as in *United States v. Gersh*, 328 F.2d 460, 464 (2d Cir.), *cert. denied*, 377 U.S. 992 (1964), Brasco has never come forward with "any affidavits of the forelady or of other jurors that would raise an

issue of prejudice . . ." To be sure, in *Gersh* Judge Friendly suggested that on that record, a request for a hearing, if made, should have been granted. But in *Gersh* the factual circumstances disclosed by the record were that the forelady had begun to receive anonymous phone calls for the first time when she joined the jury.* While there was no actual showing that the forelady attributed the calls to the defendants, the fact that she disclosed them to the trial judge and the fact that presumably a juror receiving threatening phone calls during a trial would not ascribe them to the United States Attorney, discloses a far more substantial foundation for a hearing than what was offered in this case *after* the defense had interviewed over half the jurors.

Were this Court to direct a hearing in this case on the showing made below, it would mean that such post-trial hearings would be required on demand in every single criminal trial. Virtually all criminal cases tried in this Circuit are tried with unsequestered juries whose members return to their homes at night, even during deliberations. At such times all jurors presumably talk to their families, read newspapers and watch television during the taking of evidence and during deliberations, although they presumably abide by the Court's instructions not to discuss the trial or listen to anything said about it. The showing made below by Brasco, despite his extensive and offensive post-trial efforts, does not go beyond this. To be sure, the jury here was sequestered by Judge Cannella's order, so that in this case there is the additional factor that the sequestration order was violated. However, to the extent that violations occurred they appear to have been backslidings by the deputy marshals, on whom the duties imposed by the sequestration order rested. Indeed, the incident of the newspaper article, discussed *infra*, establishes that the jurors were conscien-

* Judge Friendly later characterized the phone calls in *Gersh* and another case as "threats to jurors". *Miller v. United States*, *supra*, 403 F.2d at 83-84 n.11 (2d Cir. 1968).

tious in following the Court's instructions that their deliberations not be tainted by extraneous influences, even when there was a failure on the part of the deputies to perform adequately. The fact that Judge Cannella in his discretion chose to sequester the jury to insulate against the possibility of juror contact with prejudicial material does not support any presumption or inference that a violation of the sequestration order necessarily meant the jurors were so exposed.

D. The newspaper article

Judge Cannella did take evidence at the post-trial hearing about the exposure of certain of the jurors to a newspaper article from the July 2 issue of the New York Post describing the reading of Masiello's testimony.* Ten of the jurors testified and the balance, who were not available for the hearing, were interviewed by telephone by the Court or his law clerks. The two jurors, Hutton and Purpo, who had noticed the article in the inadequately edited paper, testified that they had seen but not read it ** and Hutton, who had found it in the paper, destroyed it. Both Hutton and Purpo swore that seeing the article had not prejudiced them.*** Judge Cannella credited their testimony in its entirety and found no basis for setting aside the verdict.

* The article, identified by juror Hutton at the hearing, is set forth in full, *supra*, pp. 62-63.

** Purpo's testimony that she had not read it was corroborated by a tape recording surreptitiously made by Barbarino. (See p. 66, *supra*, P.Tr. 232-236). Hutton testified that he had seen the headline and the first part of the article and immediately stopped reading it. Purpo testified that she had not read the article and knew only that it related to "Mr. Masiello's not appearing in Court."

*** The other jurors all testified that they had not read the article.

Brasco makes several complaints about Judge Cannella's findings. First he claims Judge Cannella should not have believed Jurors Hutton and Purpo because their testimony differed on details of the incident and because Purpo was to some extent contradicted by the testimony of another juror, Rivera, who claimed to have been present when Hutton discovered the article and showed it to Purpo. They also claim that the trial judge erred in his resolution of credibility because defense counsel and Barbarino testified to prior statements of Purpo that were inconsistent to some extent with her testimony at the hearing. The short, and complete, answer to the claim is that, as Judge Cannella found, the claimed inconsistencies were minor and the testimony of Hutton and Purpo was entirely credible. Such a determination is the function of a trier of fact, *United States v. Zanfardino*, 496 F.2d 887 (2d Cir. 1974), and Judge Cannella's determination of Brasco's motion may not be set aside on appeal unless "clearly erroneous", *Morgan v. United States* 399 F.2d 93, 97 (2d Cir.), *cert. denied* 393 U.S. 1025 (1969), hardly the situation here. Judge Cannella was not obliged to credit the statements of Brasco's partisans. *United States v. Polizzi*, 500 F.2d 856, 884-886 (9th Cir.), *cert. denied*, 43 U.S.L.W. 3403 (February, 1975).

Indeed, even assuming that the factual arguments pressed by Brasco were accepted—that Purpo had, in fact, read the article, there is nothing in the article which approaches the kind of potential prejudice which, in the trial judge's discretion and with the assurances by the jurors they were unaffected—as here, has been found insufficient to void a verdict, *United States v. Miller*, 381 F.2d 529, 538-540 (2d Cir.), *cert. denied*, 392 U.S. 929 (1968); *United States v. Persico*, 425 F.2d 1375, 1379-1380 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970); *United States v. Palmieri*, 456 F.2d 9, 13-14 (2d Cir.), *cert. denied*, 406 U.S. 945 (1972); *United States v. D'Andrea*, 495 F.2d 1170, 1172 (3d Cir. 1974). Compare *United States v. Ratenni*, 480 F.2d 195-196 & n.2

(2d Cir. 1973).^{*} The only information in the news article which was not clear from what was properly before the jury in the evidence was that Brasco's first trial had ended in a mistrial because of a hung jury ^{**} and that Masiello had not testified because ". . . he felt his appearance on the stand would endanger the life of his wife, who has recently been ill".^{***} The latter fact was hardly indicative of any guilt or prior misconduct by Brasco, *Compare United States v. Palmieri, supra, United States v. Edwards*, 366 F.2d 853, 873 (2d Cir. 1966), *cert. denied*, 386 U.S. 908 (1967), and the fact that the jury had been unable to agree on a verdict at the first trial was certainly as helpful to Brasco as it could have been harmful. But whatever the effect the article might have had if the jurors had read it, contrary to their sworn testimony and the trial judge's findings, its impact would have been substantially blunted by the passage of

^{*} Brasco argues that Judge Cannella misconstrued this Court's holding in *Ratenni* and placed inordinate weight on the testimony of the jurors who had seen the newspaper article that it did not affect their judgment of the case. That contention is clearly wrong. *United States v. Flynn*, 216 F.2d 354, 372 (2d Cir. 1954). While, as Brasco points out, the impact of a news article cannot be judged solely by a subjective standard and disclaimers of prejudice by jurors, regardless of its contents, do not end the matter, a juror's statement of the effect of reading a newspaper article is nonetheless relevant to the Court's inquiry, as it clearly was in *Ratenni*. See also *United States v. Miller, supra*. In this case, in contrast to *Ratenni*, objective standards—the subject matter of the article and the testimony of the jurors that they had not read it—establish that the article cannot have had any prejudicial impact on the jury's deliberations.

^{**} The Court felt it was unnecessary to remind the jury that the trial was a "re-trial" stating that he thought they were fully aware of it (Tr. 19). The jury was never informed that the first trial jury could not reach a verdict.

^{***} The Court did not explain the reason for Masiello's absence to the jury other than to say, "Now, because of facts which do not concern you in any way whatsoever, a witness who testified at the previous trial will not be here. I have declared that as far as the law is concerned, he is therefore unavailable." (Tr. 1095)

more than two weeks between its appearance on July 2 and the verdict on July 19. *United States v. Persico*, *supra*, 425 F.2d at 1380.

Finally, Brasco also quibbles about language in the opinion denying his new trial motion, claiming that his statement (at 11) that the defendant had "failed to sustain his burden of proving that any juror who came in contact with the newspaper article was prejudiced against him" improperly put the burden on him of establishing prejudice instead of leaving it with the Government, where he claims it belonged (Br. at 58-59). We respectfully submit that the trial judge placed the burden exactly where it belonged. *United States v. Noah*, 475 F.2d 688, 692-693 (9th Cir. 1973).^{*} Even if Brasco were right, however, Judge Cannella, elsewhere in his opinion (at 13), also analyzed the evidence substantially by the standard Brasco contends should have been used ^{**} and precisely as it was in *United States v. Palmieri*, *supra*. Moreover, any departure from the standard for which Brasco contends can have made no meaningful difference to the result. A failure by Brasco to demonstrate "the slightest suggestion of prejudice" *a fortiori* establishes that the Government has sustained the burden Brasco claims the Government has of showing that a juror's exposure to an outside influence regarding the case on trial was harmless".^{***} See *United States v. Pfingst*, 477

^{*} *Noah* is particularly apposite to this case, since the facts of *Noah* and this case are virtually identical on this point.

^{**} "[T]he Court can find not the slightest suggestion of prejudice of whatever nature to have been demonstrated by the defendant.

^{***} Indeed, there is substantial authority cited by the District Court, *e.g.* *United States v. D'Andrea*, *supra*, that there must be a showing of "substantial prejudice" from publicity of extra-record facts reaching the jury before a new trial need be ordered. *Cf. United States ex rel. Owen v. McMann*, 435 F.2d 813, 818 (2d Cir.), *cert. denied*, 402 U.S. 906 (1957). Indeed, *D'Andrea*, *United States v. Palmieri*, *supra*, and *United States v. Persico*,

[Footnote continued on following page]

F.2d 177, 198-199 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973).

POINT II

The statute of limitations did not bar this prosecution, and there is no merit to the claim of prejudicial pre-indictment delay.

A. The prosecution was not time barred

Brasco contends that his prosecution was barred by the five-year period of limitation provided for by 18 U.S.C. § 3282 because the Government allegedly failed to prove an overt act after October 23, 1968, when the five year period prior to the return of the indictment on October 23, 1973 commenced. The argument is wholly without merit.

In determining whether a prosecution under 18 U.S.C. § 371 is time barred, the "crucial question", as the Supreme Court held in *Grunewald v. United States*, 353 U.S. 391, 397 (1957), "is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." If the Government proves that the last overt act committed by any co-conspirator in furtherance of the main criminal objectives of the conspiracy occurred during the five-year

supra, all suggest that the standard articulated in *Remmer v. United States*, *supra*, which did not involve publicity reaching the jurors during trial, has no application to the issue raised here. Brasco distinguishes *D'Andrea* on the ground that in that case the facts became known before the case went to the jury, and the Court admonished the jury not to consider it. While there was no such instruction directed to the specific news article found by Hutton, the trial judge clearly instructed the jury to decide the case solely on the evidence before it. (Tr. 2-6). *United States v. Bando*, 244 F.2d 833, 848-849 (2d Cir.), *cert. denied*, 355 U.S. 844 (1957).

limitation period, the conspiracy count must be sustained. *Id.*; *United States v. Portner*, 462 F.2d 678, 680-81 (2d Cir.), *cert. denied*, 409 U.S. 983 (1972); *United States v. Johnson*, 165 F.2d 42, 45 (3rd Cir.), *cert. denied*, 322 U.S. 852 (1947). In the present case, there was direct evidence of Frank Brasco's own conduct in furtherance of the main object of the conspiracy, as well as that of other co-conspirators, after October 23, 1968.

The indictment alleged that the conspiracy began in June, 1967 and continued until January 4, 1969. It charged that the purpose of the conspiracy was "to obtain and retain from the Post Office Department truck leases and monies payable thereunder for co-conspirator John A. Masiello and corporations controlled by him, by unlawful and fraudulent means, to wit, by defrauding the United States in violation of Title 18, United States Code, Section 371, and by committing violations of Title 18, United States Code, Sections 201, 203 and 1341 . . ." (A. 2-3). The indictment further charged that one of the specific means used to carry out the conspiracy and secure its objectives was that Frank Brasco and his uncle Joseph, knowing that A.N.R.'s contract with the Post Office had been cancelled on May 31, 1968 because of the criminal record and background of Masiello and others associated with A.N.R., corruptly and fraudulently arranged to assist and did assist Masiello in obtaining truck leases with the Post Office Department for other corporations which he in fact controlled, but which would appear to the Post Office to have independent management and control (§ 8(c), A. 6-7).*

* Frank Brasco persists in protesting on appeal, as he did at the trial below, that Masiello et. al. did not do a very good job of deceiving the Post Office. The simple answer remains that success is not an essential element of a conspiracy to defraud. See *United States v. Reina*, 446 F.2d 16 (9th Cir. 1971); *United States v. Gross*, 416 F.2d 1205, 1209-1210 (8th Cir.), *cert. denied*, 397 U.S. 1013 (1969); *United States v. Whiting*, 308 F.2d 537, 540 (2d Cir.), *cert. denied*, 372 U.S. 909 (1963); *Huff v. United States*, 301 F.2d 760 (5th Cir.), *cert. denied*, 371 U.S. 922 (1962).

Briefly, summarized, the proof on this aspect of the conspiracy was as follows:

(1) In late May and June 1968, Frank Brasco discussed with Doherty and Weiner the possibility that Masiello would try to get back in with the Post Office through nominee companies. (Tr. 1370, 292; *see also infra*. pp. 31-32, 36).

(2) After learning from Doherty that A.N.R.'s contract would not be renewed, Brasco lied to Post Office General Counsel Timothy May about his knowledge of and efforts on behalf of Masiello and asked May whether the Post Office would consider doing business with a company which was entirely independent of the Masiello group. (Tr. 632-635). Brasco made the same request of Howard Cook, another Postal official. (Tr. 2955) Further, eleven days after A.N.R.'s contract was terminated Brasco appealed to the Postmaster General's Executive Assistant, Douglas Nobles, for a chance to talk the Postmaster General into changing the decision on A.N.R. (Tr. 2915; *see also, infra*. p. 39) *

(3) In early July, 1968, Frank Brasco summoned Doherty to Brasco's summer place in Annapolis. Brasco told Doherty that Masiello had formed a company called Randen, in which Masiello did not appear as an owner or officer, to do business with the Post Office. Brasco asked Doherty what Randen's chances were of "keeping" or "getting" a

* Throughout his argument on the statute of limitations claim, appellant persists in portraying Brasco's queries to Doherty, Weiner, May and Cook about an "independent" company taking over the contract as if they somehow showed that Brasco was actually attempting to substitute "new untainted management for the criminal element." (Br. 77-80) This argument overlooks two basic facts: (1) the Government's proof showed that Brasco was already aware in May, 1968 that any use of Masiello's trucks by an "independent company" would be a ruse with Masiello pulling the strings; and (2) Brasco denied categorically that he ever had any conversations with anybody about the status of Masiello, his trucks, or any new companies after May 31, 1968.

contract with the Post Office. (Tr. 296-298; *see also infra.* pp.) *

(4) In November, 1968, after Randen had been terminated and while two new Masiello bids were pending (one in the name of T.A.B. Trucking and one in the name of A.N.R.), Brasco asked Doherty to lunch at the Capitol Rotunda Restaurant in Washington and again asked what chance Doherty thought these companies had of getting a contract. (Tr. 299; *see also, infra.*, pp. 40-41) ** All of this proof demonstrated Frank Brasco's direct involvement in a phase of the conspiracy designed to keep Masiello in business with the Post Office after the termination of A.N.R.'s con-

* Appellant complains that Frank Brasco's conversations with Joseph Doherty in July, 1968 about Masiello's status with the Post Office were not in furtherance of any conspiracy because Randen had already "won the bid" and so there was no need for Brasco or anyone else to help. (Br. 80-82, 85) Appellant has his facts wrong. Although Randen was low bidder it was not awarded a contract, but rather was merely given the opportunity to supply trucks to the Post Office on a per diem basis, pending the completion of an investigation to determine its independence from Masiello. (Tr. 2041-2043) Thus, Brasco's question whether Doherty thought Randen could "keep" or "get" a contract with the Post Office was a very apt one. (Tr. 298)

** Brasco denied this meeting, as he did every bit of proof that he said anything about A.N.R. or Masiello after May 31, 1968. He also called a New York Supreme Court Justice who said he had flown back from Washington to New York with Brasco on the afternoon of November 14, thus casting doubt on Doherty's diary entry, which showed "12:00 Cong. Brasco Rotunda" for November 15, 1968. (GX 37 A-3). However, Doherty's testimony was supported by the fact that the November 15 date was the same as that on which the new Masiello bids were submitted (GX 25 and 26), and in any event the credibility of Doherty's testimony as to when the meeting took place and what Brasco said was for the jury to decide.

tract, exactly as charged in the indictment.* Brasco's invitation to Doherty to lunch in November 1968 and his inquiry at that meeting as to whether Masiello's then pending new bids could succeed were plainly in furtherance of the conspiracy.** But even if Brasco's meeting with Doherty in November had not been in furtherance of the conspiracy, Brasco would be no better off. Masiello himself performed acts in furtherance of the conspiracy within the limitations

* Stuck with this proof, Brasco suggests that whatever he did after May 31, 1968 was not in furtherance of a conspiracy with Masiello or anyone else, because there was no proof that Masiello specifically *asked* him to do anything for him after that date. This latter statement is technically correct, as a review of Masiello's contacts with Joseph Brasco after May 31, 1968 shows:

- (i) He called Joseph Brasco shortly after May 31, 1968 to tell him, "That we were cancelled out with the contract, . . . if he could find anything out about it, why I was cancelled out." (Tr. 1219);
- (ii) He called Joseph Brasco again in late June or July to "let him know that I was getting back into the Post Office under the name of Randen Trucking." (Tr. 1234, 1816-7);
- (iii) He called Joseph Brasco again in November 1968 to "let him know that I was going to bid on T.A.B. and A.N.R. Leasing again." (Tr. 1248, 1632).

Nevertheless, it is perfectly clear that these calls were understood as a reminder that Masiello wanted a continuing friendly hand in return for his May 1968 payment of \$10,000.00 and that the many acts and inquiries performed by Frank Brasco on Masiello's behalf after May 31, 1968 did not represent some unilateral frolic of his own.

** This is a far cry from the situation in *United States v. Birnbaum*, 337 F.2d 490 (2d Cir. 1964), where the conversation between co-conspirators occurred some four years after the defendant's last act in the conspiracy and had nothing to do with the continued execution of the old scheme. In this case Brasco was clearly continuing his pattern of seeking the advice and expertise of Doherty in order to continue to help Masiello, as he had done from the conspiracy's inception.

period by supplying trucks to the Post Office under the name of Randen until October 26, 1968 (GX 53 and 54; Tr. 705), and by bidding again through a nominee on November 15, 1968. Since nothing in the record remotely suggested a withdrawal by Brasco from the conspiracy, Brasco was bound by acts committed in furtherance of the conspiracy after October 23, 1968 whether or not he performed or was aware of them. See *United States v. Borelli*, 336 F.2d 376 (2d Cir.), cert. denied as *Cinquegrano v. United States*, 379 U.S. 960 (1965); *United States v. Goldberg*, 401 F.2d 644 (2d Cir.), cert. denied, 393 U.S. 1099 (1969); *United States v. Seuss*, 474 F.2d 385 (1st Cir.), cert. denied, 412 U.S. 928 (1973).

B. Pre-indictment delay did not deny Brasco a fair trial

Appellant claims that a four year delay between the initial investigation of the charges against Frank Brasco * and his indictment denied him a fair trial. He purports to show actual prejudice to the conduct of his defense and charges the pre-indictment delay to "inexcusable governmental inaction." (Br. at 95) The record, however, does not establish either significant prejudice to the defendant or any design on the part of the Government to secure a "tactical advantage" over the accused.**

* While the investigation began in 1969, some four years before the October 23, 1973 indictment, Brasco was put on notice of the investigation by the F.B.I. in December of 1970. (Tr. 745-754)

** The Supreme Court in *United States v. Marion*, 404 U.S. 307 (1971) seemed to require both that the defendant had been prejudiced by the delay and that the delay represented a "purposeful device to gain tactical advantage over the accused" before an indictment brought within the statute of limitations would be dismissed. However, this Court has stated that, "It is unclear from the [Marion] opinion whether a successful claim under the due process clause must establish both actual prejudice and intentional delay on the part of the Government, or whether a showing of

[Footnote continued on following page]

Appellant raises a variety of points in an attempt to show actual prejudice. He first complains that key witnesses to important events had died by the time of the indictment, namely Sullivan, Ferraro and Fitzell.*

Appellant speculates that Sullivan, "could put the lie in Doherty's mouth" (Br. at 90) and presumably claims that Ferraro's testimony would have contradicted that of John Masiello. But appellant has nothing to support these contentions beyond his own assertions which are, in turn, based on sheer speculation. The facts remain that Doherty's and Masiello's testimony was substantially corroborated by other witnesses as well as documentary evidence and that their credibility as well as the absence of Sullivan and Ferraro were issues fully presented to the jury.

Appellant next claims that he was unable to recall events and had a difficult time reconstructing them. (Br. at 92) As an example of his alleged problem, Brasco makes much of the alleged fact that, because of the long delay he

the former alone would be sufficient." See *United States v. Iannelli*, 461 F.2d 483, 485, n.2 (2d Cir.), cert. denied, 409 U.S. 980 (1972). In the later case of *United States v. Schwartz*, 464 F.2d 499, 503, n.5 (2d Cir.), cert. denied 409 U.S. 1009 (1972) this Court again indicated that actual prejudice alone may warrant the dismissal of an indictment. See also *United States v. Mallah*, 503 F.2d 971, 989 (2d Cir. 1974). However, this Court's recent decision in *United States v. Brown*, Dkt. No. 74-1947 (2d Cir. February 20, 1975), slip. 1847 holds that proof of prosecutorial misconduct "is the mandate of" *Marion. Id.* at 1851.

** It is difficult to understand how Fitzell's presence at trial could have materially aided the defense. At the very most Fitzell might have testified that he was not contacted by Joseph Weiner, with regard to an attempt by Weiner to get the loan for John Masiello. (See Tr. 1457, 1332-3) Weiner testified that he contacted several sources, not just Fitzell, and this hardly seems to be a crucial piece of his testimony.

It should also be noted that Thomas McKeever, a witness to the Masiello-Ferraro-Joseph Brasco payoff was alive at the time of the second trial, and had denied at the first trial that he was present at any such payoff, but was not called by the defendant at the second trial. (Tr. 2659-2662).

was unable to recall the precise dates of conversations that he had with postal officials Cook and Nobles. Yet the real issue here was not precisely when Brasco spoke to these men, but whether he spoke to them at all on behalf of A.N.R. after the day on which he was informed by Timothy May of Masiello's criminal background.* Further, Brasco's claim of lapse of memory is unconvincing in light of his detailed memory of certain items helpful to him.** Since Brasco was able to give a more than coherent account of his version of the facts, his claim of prejudice must fail. *United States v. Capaldo*, 402 F.2d 821 (2d Cir.), *cert. denied*, 394 U.S. 989 (1968); *United States v. Briggs*, 457 F.2d 908, 911 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972); *United States v. Ferrara*, 458 F.2d 868, 875 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972). *United States v. Mallah*, *supra*, 503 F.2d at 589.

Appellant's final claim is that he was prejudiced because "important documents had been lost and destroyed." (Br. at 90) More specifically he cites the loss of Doherty's 1967 telephone records and the tape recordings of Doherty and Weiner made during their respective interviews at the Baltimore U.S. Attorney's office. Nowhere does appellant indicate how he was prejudiced by their loss, and there is no indication on the record that the loss of these documents

* It was Brasco himself who told the F.B.I. back in 1970 that as soon as he learned of Masiello's background he "adopted a hands off attitude with respect to A.N.R." and instructed his staff to do likewise. He held this position through the trial and two members of his staff also testified to receiving these instructions from him. His memory on this point was very clear. (Tr. 2246-7; GX 57)

** Two examples of this detailed memory are his certain memory of the conversation that he had with Tim May on May 31, 1968 (Tr. 2246) and his vivid recollection of the purpose of the trip he took with Judge Thompson. (Tr. 2258) Further, with the help of the minutes from the House Post Office and Civil Service Committee he was able to remember that his call to Doherty on April 5, 1968 (some three days before the New York office loan meeting) had to do not with arrangements for the meeting, but with assaults on letter carriers. (Tr. 2528-9).

was deliberate on the part of the Government.* On this record, appellant's claim must be rejected. *United States v. Dornau*, 356 F. Supp. 1091, 1094 (S.D.N.Y. 1973).

Finally, it also is perfectly clear from the record that the Government did not purposely delay indictment to achieve any tactical advantage in this case. While Doherty and Weiner were available in 1969 and 1970, Masiello did not relate his part in the conspiracy to the Government until September of 1973 (Tr. 1631). The Government indicted Frank Brasco some six weeks later. *United States v. Ferrara*, *supra*, 458 F.2d at 875; *United States v. Brown*, Dkt. No. 1847 (2d Cir., February 20, 1975), slip op. 1847 at 1850-51.

POINT III

The evidence of Frank Brasco's guilt was more than sufficient to convict.

Citing the many character witnesses who testified on his behalf and complaining that Masiello, Doherty and Weiner were "acknowledged criminals and liars" (Br. at 96), Brasco says the evidence against him was insufficient to convict. The argument is entirely frivolous. The testimony of the Government's principal witnesses amply established Brasco's guilt, and all of the credibility questions were for the jury to decide. Moreover, there was a mass

* At a hearing held during the first trial the United States Attorney for Baltimore, George Beall testified under oath that he attempted but was unable to find the dictaphone belts from which GX 35006 and 3514 were typed (the Doherty and Weiner interviews). He also testified that after typing, the normal practice in his office was to reuse or discard the belts (Tr. 409-411). An examination of the transcripts themselves shows that they appear to be substantially verbatim and are not edited summaries. Further, if there is some allegation here that these transcripts were doctored, the Government need only point to the extensive use counsel for the defendant was able to make of them as 3500 material on cross. (See GX 3506, 3514).

of corroborative evidence which appellant simply chooses to ignore in his brief.*

* Brasco's brief is loaded with false statements and huge omissions of important evidence. By way of example only, Brasco leads off his brief by stating that certain things are "undisputed and uncontradicted", including that "there is no claim that Frank Brasco gave or received any money or that he in any way received personal benefit or enrichment" (Br. at p. 3). That is technically accurate, but ignores the testimony of Doherty and Weiner that Frank Brasco *agreed* to accept an under-the-table cash payoff via his "Uncle Joe" Brasco for helping to get Masiello a loan, and Masiello's testimony that he gave \$10,000 in cash to Joseph Brasco, who said it was to go "down below". Brasco's next "undisputed and uncontradicted" item is that "no evidence whatsoever was presented that acts performed by [Frank Brasco] were outside the scope of his legitimate and regular duties as a Congressman . . ." (Br. at p. 4). Later appellant answers that "Even accepting Doherty's testimony one looks in vain for any testimony of any agreement on the part of Frank Brasco in words or substance to engage in any bid rigging or to accept any money" (Br. at 99, and see also 103). The Government's Statement of Facts and the text in this Point demonstrate the falsity of these statements, which ignore such obvious parts of the Government's case as Brasco's request to Doherty that he give Masiello favored coaching on what to bid on a competitively bid contract, and the testimony of both Doherty and Weiner about Brasco's agreement to take a cash payoff on the loan. Later, at the beginning of his sufficiency point, appellant proclaims that "as soon as he learned from Post Office officials about Masiello's criminal background, Brasco ordered a hands-off policy, and this was confirmed by two of his employees" (Br. at p. 96). Similarly, this proof reads out of the record the testimony not only of Doherty and Weiner, but also of two utterly untainted postal officials, Douglas Nobles and Howard Cook, that Brasco kept right on scrambling to help Masiello after he was told by the Post Office General Counsel of Masiello's background. Several pages later in his sufficiency point appellant says that "the evidence in the record fails to show that Brasco had any knowledge whatsoever of Masiello's criminal background" and that "When all is said and done, . . . a retrospective viewing of the record makes it perfectly clear that Congressman Brasco knew nothing of Masiello's past" (Br. at p. 100-101). It is hard to see what appellant sought to gain by these false statements, which hide from this Court the testimony of Doherty and Weiner that Frank Brasco openly and expressly discussed with them both Masiello's criminal backgrounds.

At a minimum, the jury was entitled to find that Frank Brasco's efforts to get and keep the contract for Masiello established that Brasco was guilty of conspiring to defraud the United States by depriving it of Doherty's and his own faithful and honest services. Doherty testified that Frank Brasco asked him, a postal official, to advise Masiello what to bid on a competitively bid contract, and both Doherty and Masiello testified that Doherty subsequently gave Masiello that advice in Frank Brasco's office. Weiner and Doherty testified that, when the Post Office refused to continue A.N.R.'s contract because of Masiello's involvement, Frank Brasco schemed with them about a re-offer by Masiello of his trucks to the Post Office through companies which would appear to be independent of Masiello, but which he would in fact still control. Post Office General Counsel Timothy May testified that Frank Brasco denied to him that he even knew Masiello, falsely claimed to be calling on behalf of "innocent creditors" of A.N.R., and then, in an obvious attempt to deceive May, asked whether the Post Office would lease the trucks if ownership were transferred to an "independent" group. These items of proof alone were classic examples of the kind of scheming which violates the "conspiracy to defraud" provisions of Title 18, United States Code, Section 371. See *United States v. Johnson*, 383 U.S. 169, 172 (1966); *Haas v. Henkel*, 216 U.S. 462, 476-480 (1910); *United States v. Sweig*, 441 F.2d 114 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971); and *United States v. Peltz*, 433 F.2d 48 (2d Cir.), *cert. denied*, 401 U.S. 955 (1971).

Moreover, the jury was also justified in concluding that Frank Brasco had conspired to receive a bribe. Masiello's testimony that he delivered \$10,000 to Joseph Brasco to be delivered "down below", coupled with the testimony of Doherty and Weiner that Frank Brasco appointed Joseph Brasco to be the bag man for a contemporaneous proposed cash payoff to Frank Brasco for his part in getting the loan for Masiello, were strong circumstantial proof that the

\$10,000 delivered by Masiello to Joseph Brasco was destined for Frank Brasco. As the Statement of Facts, *supra*, spells out in detail, there was a mass of corroboration for the testimony of Masiello, Doherty and Weiner.

(1) Proof of the initial meeting between Brasco, Doherty and Masiello in June of 1967 was strongly corroborated by GX 28A and 28B, two pieces of note paper with the imprint "From the Desk of Frank Brasco". These note papers not only corroborated Doherty and Masiello's testimony that the meeting occurred in Brasco's D.C. office, but also that the conversation involved the June, 1967 bid and ways to help Masiello out with regard to that bid. (See p. 9, *supra*.)

(2) The April, 1968 meeting at Brasco's New York office, at which Doherty and Weiner testified it was agreed that Joseph Brasco would receive Frank Brasco's half of a financing fee for him in cash was corroborated by a mass of documents: a) Doherty and Brasco's telephone records. (GX 39 and 91); b) Doherty's diary entry (GX 37), and his airline ticket (GX 38) and c) Weiner's check to American Airlines. (See p. 23, *supra*.)

(3) The Government was also able to corroborate Doherty's testimony that he and Brasco dealt with Tom McKeever in their efforts to aid Masiello on both getting a loan and working out his mileage problem. The March visit of McKeever to Washington, D.C. and the Brasco-Doherty-McKeever meeting on March 19 were corroborated by motel charges for McKeever (GX 42) and Doherty's diary entry of March 19 showing "11:00 Cong. Brasco." (GX 37A) (See p. 21, *supra*.)

(4) The testimony that Brasco was involved with Doherty and Weiner in trying to get Masiello a loan was supported by: a) the April 26 telegram (GX 5); b) the testimony of Harold Schore, Masiello's accountant (Tr. 1015-1025); c) the testimony of Harry Kagan, Weiner's

cousin (Tr. 935-941); d) the testimony of Daniel Himmel, Brasco's ex-law partner (Tr. 950-959), and (GX 89) (Masiello's name and telephone number in Himmel's rolodex); e) GX 51, Weiner's letter to Brasco regarding the loan, (See p. 37, *supra*) and f) GX 6A through 12, and GX 19 financial statements of ANR sent to Weiner so that he could negotiate a loan. (See p., *supra*); along with financial projections for Masiello's shell company Terrace. (See p. 24, *supra*).

(5) The Government also was able to corroborate Doherty and Weiner's testimony that Frank Brasco helped them in their efforts to get a renewal letter for Masiello. The Hass memo (GX 47) as well as Coffman's testimony of the call he received from Frank Brasco (Tr. 2993-2994) are strong corroboration of this. (See pp. 28-29, *supra*).

(6) Brasco's efforts to "get" or "keep" a contract for Masiello after he learned of the cancellation from May were corroborated by the testimony of Nobles and Cook, who had no motive whatsoever to lie. (See pp. 38, 39-40, *supra*).

(7) Brasco's Capitol Hill telephone records also offer strong corroboration that the conspiracy proceeded along the lines that Doherty, Weiner and Masiello testified that it did. Brasco's phone records show some seven calls to Masiello (either at A.N.R. or at his home in Yonkers) in October and November 1967—the time period during which Masiello rebid, after being coached by Doherty at Brasco's request, and during which Doherty and Brasco worked on getting Lehigh, a lower bidder than A.N.R., disqualified. His telephone records also show calls to Weiner and Doherty shortly before the April 8, 1968 law office meeting to discuss Masiello's loan, and finally his records show calls to Weiner on May 28, June 12 and 20 and to Masiello on May 14, 21, 22 and also on May 28. May 28 was the date Brasco and Doherty discussed the cancellation of A.N.R. after working earlier in the week to get the Post Office in New York to issue a renewal letter. (See p. 31, *supra*).

(8) Finally, the Government was also able to introduce numerous Post Office records including bids, bid abstracts, internal memoranda and correspondence which corroborated Doherty's testimony as to his and Brasco's efforts on behalf of Masiello and A.N.R. each step of the way. Notable among these exhibits are GX 34 and 35 (the Brewer memos showing the referral of Lehigh to SBA in November of 1967; GX 16 and 17 (the Doherty and Strachan renewal letters dated May 24, 1968) and GX 22 and 23 (the Salvan letters to the Post Office asking for relief for A.N.R. through its mileage claim).

The evidence was clearly more than sufficient to convict Frank Brasco.

POINT IV

John Masiello's refusal to testify rendered him unavailable and his prior trial testimony was properly read to the jury.

Appellant claims that the introduction of Masiello's testimony at the first trial transgressed his Sixth Amendment right of confrontation. The principal argument advanced is that the prosecution did not adequately demonstrate that Masiello was truly unavailable.* There is no merit to this claim, and the District Court's decision (385 F. Supp. 964 (S.D.N.Y. 1974) admitting the testimony was correct.

* The testimony read to the jury was given by Masiello under oath at the first trial, with full opportunity for the defense counsel, who also represented Brasco at the second trial to cross examine the witness. In *Pointer v. Texas*, 380 U.S. 400, 407 (1965), the Supreme Court pointed out that a major reason for the confrontation rule is "to give a defendant charged with [a] crime an opportunity to cross examine the witnesses against him."

The record establishes that when Masiello refused to testify on June 26, 1974, erroneously claiming his Fifth Amendment privilege in spite of a grant of immunity, the trial court adjudged him in civil contempt. Masiello also refused to testify the following day, and when he persisted in his refusal on July 1, 1974, the district judge gave Masiello oral notice that he would be tried for criminal contempt, and ordered Government counsel to put the matter on for trial as soon as possible before him. (Tr. 1085-1086). The trial court then declared Masiello's in person testimony unavailable and allowed the prosecutor to read his prior trial testimony to the jury. Decisions of the Tenth and Fifth Circuits, as well as in the new Federal Rules of Evidence support the correctness of this decision.* See *Mason v. United States*, 408 F.2d 903 (10th Cir.), cert. denied, 400 U.S. 993 (1971); *United States v. Mobley*, 421 F.2d 345 (5th Cir. 1970). In these cases, each of the witnesses whose testimony had been deemed unavailable had been granted immunity and invoked the Fifth Amendment privilege to support his refusal to testify; when the refusal persisted, each witness was cited for contempt.**

In the face of this authority and failing to find any case law to the contrary, appellant attacks Masiello's avail-

* The Proposed Federal Rules of Evidence were approved January 2, 1975. P.L. 93-595. The Federal Rules of Evidence read in pertinent part:

Rule 804 (a) Definition of unavailability. "Unavailability as a witness" included situations in which the declarant:

...

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so . . .

** The witness in the Mobley case was found to have no proper Fifth Amendment claim as he had already pled guilty to the charges he was to testify about. See *United States v. Mobley*, *supra*, 421 F.2d at 351, n.5 (5th Cir. 1970).

ability on two grounds. First, without any support from the record, he attempts to argue that Masiello's motives for not testifying had nothing to do with his sick wife, but were rather an attempt on his part to be able to tell "his people" he was no longer a stool pigeon. (Br. at 109) Second, appellant claims that the trial court and the Government did not do everything in their power to induce Masiello to testify.

Appellant's attack on Masiello's motivations goes beyond whether or not he was actually available. Whatever his motivations were, the fact is uncontroverted that he refused to testify. Appellant is arguing, in effect, that if a witness chooses to refrain from testifying a second time for unworthy motives, the Government is somehow chargeable with his conduct and should not be permitted to introduce his testimony. This argument is not persuasive. First, it is frequently impossible to know what really motivates a witness' refusal to testify. Furthermore, neither reason nor fairness dictates that if manipulative motives are alleged, they should be charged to the Government. Cf. *United States v. Bentvena*, 319 F.2d 916, 941 (2d Cir.), cert. denied, 375 U.S. 940 (1963). If consideration of Masiello's motivations is relevant, however, even here appellant's argument fails. The record substantiates serious, justified concern on Masiello's part for his wife's health and nowhere is there any indication that his motives were otherwise.*

* Appellant makes much of the fact that although Masiello's wife attempted to commit suicide before the first trial, he nevertheless was willing to and did in fact testified at that trial. However, appellant ignores that part of the record which reveals a series of events occurring between the two trials which Masiello claimed caused him to refuse to testify. (See Tr. 1054-1060; Hearing, October 16, 1974, pp. 14-16). Most notable among these events was the fact that it was alleged that a person representing himself to be Frank Brasco's lawyer called Mrs. Masiello, tried

[Footnote continued on following page]

Appellant's second argument that insufficient sanctions were brought against Masiello also is unpersuasive. The trial court did everything in its power to compel Masiello to testify, first citing him for civil contempt and then finding him guilty of criminal contempt. The trial court also notified Masiello, through his attorney, on July 1, 1974 while the trial still had over two weeks remaining, that the court felt the punishment for Masiello's criminal contempt would be greater than six months. (Tr. 1177) * The prospect of spending an additional six months or more in prison is certainly an additional sanction, especially where the witness' sole motive to testify in the first place is to be able to show *cooperation* with the Government in order to obtain an early parole.

Appellant also suggests that the trial court should have obtained "twenty four hour attendance . . . or physical restraint" for Mrs. Masiello. Whether these solutions would have been reasonable or acceptable under the circumstances was a matter resting entirely within the discretion of the trial court.

to influence her to get her husband not to testify and divulged information to her which could only be calculated to aggravate her already hysterical condition. The Government makes this point solely to contradict appellant's argument that Masiello had no real reason to refuse to testify other than selfish motivations. It cannot and does not attribute this conduct to the defendant or his counsel.

* In fact, Judge Cannella sentenced Masiello to one year and a day to run consecutively to his other pending sentences. (See Contempt Sentence Minutes, July 26, 1974, p. 12). The argument that this consecutive sentence was not an additional sanction because the actual time to be served was left to the discretion of the parole board under 18 U.S.C. 4208(a)(2) is frivolous. It must also be noted that contrary to appellant's statement (Br. at 118), the Government did *not* join in Masiello's attorney's plea for imposition of a concurrent sentence. (See Contempt Sentence Minutes, July 26, 1974, p. 10).

Appellant's final argument is that he was prejudiced in a variety of ways by the admission of Masiello's first trial testimony. He first raises the fact that the jury was obviously unable to assess Masiello's demeanor. However, this court has already stated that the inability of a witness to testify in person, is a factor, which taken alone, is not sufficient to establish that the defendant was denied due process. *United States v. Singleton*, 460 F.2d 1148 at 1152 (2d Cir. 1973). Next Brasco contends that his inability to cross-examine Masiello with regard to the testimony of Himmel, a witness whom the Government did not discover until the second trial, caused him actual prejudice. However, appellant can only speculate that cross-examining Masiello with regard to Himmel's testimony would have aided the defense in any manner. Further, Himmel's testimony constituted but one item of the voluminous proof against Frank Brasco. (See Tr. 950-55). Brasco also cites as prejudicial his inability to cross-examine Masiello further with regard to his expectations of help from the Government in exchange for his testimony at the first trial. He claims that Masiello's subsequent sentence in Connecticut as well as other documents which came to light after the first trial provided him with additional material for cross-examination. This argument fails because the record shows that Masiello was thoroughly cross-examined on the subject of his expectations at the first trial. (Tr. 1598-1601, 1621-24, 1636, 1858-61) Moreover, at the second trial Judge Cannella allowed defense counsel to tell the jury of Masiello's plea and his sentence in the Connecticut case and also permitted him to read to them a letter Masiello wrote to the prosecutor after the first trial. (See Tr. 1881; DX BC).

Appellant finally contends prejudice resulted from the reading of the cross-examination by counsel for his co-defendant at the first trial. His claim is that the reading of this cross-examination was improper because there was no longer an identity of parties at the second trial. However, the recently adopted Federal Rules of Evidence provide

that former testimony is not to be excluded by application of the hearsay rule if "given as a witness at another hearing of the same or a different proceeding . . . , if a party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination." Rule 804(b)(1). Here it cannot be denied that appellant had the opportunity and similar motive to develop the testimony of Masiello by direct, cross or redirect examination, in the first trial. Further the cross-examination by counsel for Joseph Brasco, appellant's co-conspirator, was motivated by the same interests as those of appellant. The whole thrust of his cross-examination was to destroy the credibility of Masiello especially with respect to the payment of the \$10,000 bribe to his client. This line of cross cannot be claimed to have been harmful to appellant.

POINT V

The evidentiary rulings were correct.

- A. The trial court properly allowed the Government to offer the defendant's prior false statements and testimony as evidence of false exculpatory statements evidencing consciousness of guilt**

Appellant contends that the prosecution's use of Frank Brasco's statement to the Federal Bureau of Investigation and his refusal to swear to that statement was so prejudicial that a reversal of the jury's verdict is warranted. Brasco also challenges the introduction into evidence of his prior testimony during his first trial. All of the challenged evidence was properly admitted under the rule governing false exculpatory statements which evidence consciousness of guilt.

The law is settled in this Circuit that:

"[E]xculpatory statements, when shown to be false, are circumstantial evidence of guilty consciousness and have independent probative force." *United States v. Smolin*, 182 F.2d 782, 786 (2d Cir. 1950).

See also *Wilson v. United States*, 162 U.S. 613, 620-21 (1896); *United States v. Parness*, 503 F.2d 430, 438 (2d Cir. 1974); *United States v. Lacey*, 459 F.2d 86, 89-90 (2d Cir. 1972); *United States v. DeAlesandro*, 361 F.2d 694, 697-98 (2d Cir.), *cert. denied*, 385 U.S. 842 (1966); *United States v. Montalvo*, 271 F.2d 922 (2d Cir. 1959), *cert. denied*, 361 U.S. 961 (1960); *United States v. Bando*, 244 F.2d 833, 842 (2d Cir. 1957). In the present case the falseness of Brasco's statement to the Federal Bureau of Investigation and his prior trial testimony is evidenced by the following facts:

(1) The Government introduced substantial proof that there was a meeting in June, 1967 in Brasco's office on Capitol Hill between Brasco, Masiello and Doherty to discuss A.N.R. (See p. 9, *supra*). Brasco told the F.B.I. that his first contact with Masiello occurred in early 1968 at his East New York Brooklyn District Office.

(2) The Government introduced substantial proof that Brasco was deeply involved in an effort with Weiner and Doherty to get Masiello a loan for A.N.R., and had agreed to accept one-half of a financing fee. (See p. 23, *supra*). Brasco told the FBI he could not recall any conversations with Doherty and Weiner about obtaining financing for A.N.R., denied even knowing about any attempts on Weiner's part to obtain such financing and denied that he had ever discussed splitting the financing fee.

(3) Brasco also specifically denied in the FBI statement ever being present at any meeting in his Washington or New York office during which Doherty and Weiner were both present. The Government presented overwhelming

proof that at least one such meeting did occur in Brasco's New York law office. (*See* p. 23, *supra*.)

(4) The Government proved through the testimony of Weiner and Doherty, with documentary corroboration, that Brasco did meet Friedman and did make arrangements for him and Weiner to meet Meade Esposito. (*See* p. 27, *supra*), again directly to what Frank Brasco said in his FBI statement

(5) The Government introduced testimony that Brasco knew of and spoke of Terrace Trucking Company in connection with postal contracts. (*See* p. 31, *supra*). Brasco also specifically denied this to the FBI.

(6) The Government also proved that Brasco made several contacts on behalf of A.N.R. after, according to the FBI statement, he "adopted a hand-off attitude". (*See* pp. 36-41, *supra*.)

(7) Finally, Himmel's testimony cast strong doubts on Brasco's opening statement to the FBI that at no time had he or his law firm ever represented John Masiello or A.N.R. in any manner. (*See* p. 26, *supra*).

The prior trial testimony read to the jury concerned Brasco's changing the date of his first contact with Masiello in the FBI statement from "sometime in 1967 or 1968" to "early 1968". Again, the Government had already presented strong proof of a June, 1967, meeting between Masiello and Brasco and several other efforts on Brasco's part on behalf of Masiello before 1968. The jury was clearly entitled to infer that Brasco actually changed the date in the statement in order to disassociate himself from any connection with his early efforts on behalf of A.N.R. and that his testimony at the first trial that he narrowed the possible time of his first meeting with Masiello "[B]ecause he had no recollection of the date and that was the thing he did" was a false statement on his part during the first trial. The patent falsity of both his statements to the FBI

and his prior trial testimony was ample justification for the admissibility of such false exculpatory statements.

Appellant also claims that evidence should not have been admitted which revealed his refusal to swear to the FBI statement that the Government alleged to be false. Appellant claims the use of such evidence infringed his Fifth Amendment privilege against self-incrimination. The record shows, however, that Brasco, having been fully advised of his rights, chose to make deliberately false statements, and waived his Fifth Amendment privilege. False exculpatory statements are admissible as probative evidence of a defendant's consciousness of guilt and thus of guilt itself. Similarly, the refusal to swear to a written statement voluntarily given might well suggest to a jury that the refusal was the product of a mind concerned with the risk of the penalty for perjury because the information contained in the statement was known to be false. Wigmore points out the refusal of a suspect to undergo a superstitious test is proper evidence of his guilty consciousness. 2 Wigmore, Evidence, § 275 (3d ed. 1940). Refusal to swear to a voluntary written statement, we submit, is far more probative evidence of a guilty mind. Furthermore, Brasco's refusal to swear was inseparably related to the circumstances surrounding the furnishing of the statement, and is thereby circumstantially linked to the consciousness of guilt evidenced by the falsity found therein.

Appellant also suggests that his prior trial testimony could not have properly been used for impeachment purposes until he took the witness stand in his own defense. Once again, appellant fails to recognize that his prior trial testimony was offered as a false exculpatory statement showing consciousness of guilt and not for the purpose of impeaching his credibility. In *United States v. Lomprez*, 472 F.2d 860, 862-63 (7th Cir. 1972), the Court of Appeals rejected a similar contention as follows:

"The defendants next contend that since the statements did not amount to a confession of an admission, their introduction violated the defendant's privilege against self-incrimination. The Government's theory, with which we agree, was that the statement constituted a 'false exculpatory statement' and thus had independent probative value as evidence of a consciousness of guilt. See *United States v. McConney*, 329 F.2d 467, 470 (2d Cir. 1964). The defendants maintain that 'false exculpatory statements' are admissible only where the defendant has testified and thus waived his privilege against self-incrimination. No authority is cited for this contention and the *McConney* case contravenes its validity."

B. The declarations of Seth Brewer were properly admitted during the testimony of Joseph Doherty

It is axiomatic that extra-judicial utterances are hearsay only when offered to evidence the truth of the matter asserted. *United States v. Markis*, 352 F.2d 860, 863-64 (2d Cir. 1965). On each of the approximately eight occasions that Doherty testified to Brewer's half of their conversation, the testimony related to Brewer's apprising Doherty of actions taken either by Brewer or the Post Office with regard to A.N.R.* (See Tr. 142, 160, 186, 187, 211, and 282). At no time did the Government offer these declarations to prove that these actions were in fact taken. Indeed the bulk of these actions were proven independently by the Government through the business records of the Post Office, including bids, bid abstracts and internal memoranda. The Government offered these declarations to show what in-

* Appellant misreads the record when he argues that Judge Cannella admitted Brewer's statements as those of a co-conspirator. Judge Cannella referred to Doherty as a co-conspirator whose conversations with Brewer would make no sense if only his (Doherty's) remarks were allowed into evidence (Tr. 159).

formation was in Doherty's mind in order to explain his actions as he proceeded to influence the Post Office in favor of A.N.R. in furtherance of the conspiracy. The use of Brewer's statements as circumstantial evidence to explain Doherty's state of mind was not prohibited by the hearsay rule. 7 Wigmore, Evidence § 1790 (3d ed. 1940); *United States v. Press*, 336 F.2d 1003-1010-12 (2d Cir. 1964), *cert. denied*, 379 U.S. 965 (1965); *United States v. Chason*, 451 F.2d 301, 304-05 (2d Cir.), *cert. denied*, 405 U.S. 1016 (1972); *Washington v. United States*, 275 F.2d 687, 689 (5th Cir. 1960). Furthermore, Doherty frequently testified that after speaking to Brewer he would then report back to Frank Brasco the contents of the conversation, and Brasco would make a further request of Doherty in response to the information.*

C. The evidence of an agreement among Brasco, Doherty and Weiner to split a fee resulting from an expected loan for A.N.R. was admissible

Brasco contends that the trial judge erred in admitting testimony by Doherty and Weiner that they and Brasco had agreed to share part of a fee which would accrue if Weiner were successful in arranging a loan for A.N.R. The argument advanced is that since Masiello was unaware of the plan to split the fee, the arrangement constituted a "fraud on Masiello" and a separate conspiracy from that charged in the indictment. This multiple conspiracy argument is totally without merit.

* Doherty, for example, testified that at his request Brewer said that he would look into the award of the contract to Lehigh, reported back to Doherty that he did so, and then told Doherty that the Post Office had no choice but to award the contract to Lehigh. (Tr. 186-187). Whether or not anything Brewer said was true, this was the information on which Doherty relied and acted and which he reported back to Frank Brasco. Further, the Government proved, independent of Brewer's declarations, that Lehigh was indeed recommended to receive the award. (See Tr. 185; GX 32).

The indictment alleged that one of the means used to carry out the objects of the conspiracy—which was to obtain and retain valuable truck leasing contracts for Masiello and the companies he controlled by defrauding the United States—was an effort to obtain for A.N.R. and Masiello a loan of \$875,000 with which to finance the purchase of trucks which had been bought by A.N.R. to lease to the Post Office Department. The indictment specifically alleged that this effort was made

“pursuant to an arrangement that a fee to be paid by A.N.R. Leasing Corp. for obtaining said loan would be shared, in part, as follows: \$17,500, in cash, to be delivered to defendant JOSEPH BRASCO for defendant FRANK J. BRASCO, and \$8,750 for co-conspirator Joseph Doherty.” (Indictment ¶ 8(b), A. 14).

The evidence challenged on this appeal directly supported these allegations of the conspiracy count. As more fully set forth in the Statement of Facts, *supra*, pp. 19-26, after Brasco and Doherty succeeded in helping Masiello obtain the Post Office contract for A.N.R., the focus of their efforts then shifted to help him obtain a loan to ease A.N.R.'s financial burden in connection with that contract. At this point Weiner entered the picture. Weiner, as the evidence revealed, pressured Doherty into providing him with a letter reflecting the renewal of A.N.R.'s contract which Weiner needed in order to arrange the loan for A.N.R. Both Brasco and Doherty attempted to influence the Post Office in New York to renew A.N.R.'s contract and to put the renewal in writing. These efforts were not motivated by wholly unselfish or charitable impulses. Rather, as the evidence revealed, they were prompted by an expectation that part of the fee to be paid if the loan were granted would be shared by them as alleged in the indictment.

The claim that this evidence revealed a separate conspiracy from that charged in the indictment is frivolous,

since it was offered to prove the specific allegations of Paragraph 8(c) thereof. There was never any written pre-trial motion below which challenged the legal sufficiency of the indictment on the ground that it alleged more than one conspiracy and was therefore duplicitous. Such an attack would have been entirely meritless.

Multiple conspiracy arguments like the one advanced on this appeal have not met with success in this Court. See e.g., *United States v. Sperling*, 506 F.2d 1232 (2d Cir. 1974); *United States v. Mallah*, 503 F.2d 971 (2d Cir. 1974); *United States v. Arroyo*, 494 F.2d 1316 (2d Cir.), cert. denied, 43 U.S.L.W. 3208 (1974); *United States v. Bynum*, 485 F.2d 490 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974); see also *United States v. Kenny*, 462 F.2d 1205, 1216-17 (3d Cir.), cert. denied, 409 U.S. 914 (1972). In *United States v. Aloi*, Dkt. No. 74-1220 (2d Cir., January 31, 1975), slip op. 6057 at 6072-73, this Court recently rejected a contention by appellant Dioguardi quite similar to the one presented here:

"Dioguardi claims error as to him in the introduction of an alleged partnership agreement with Hellerman whereby he was entitled to a certain percentage of Hellerman's profit obtained through his swindles. Such proof did not constitute a variance from the indictment or introduce prejudicial evidence of other unrelated crimes. The relationship with Hellerman and Dioguardi had to be developed to show Dioguardi's place in the AYSL stock fraud. Witness; Graifer's question to Sebastian when Hellerman's name was mentioned as to how and why Dioguardi was involved. (Tr. 477). The evidence, as well outlined in Dioguardi's brief, discloses a close relationship to the AYSL swindle from the initial time when Hellerman said he had to consult Dioguardi before he could proceed with the deal through the various meetings at his office, his various telephone calls to Sebastian and his interest in keeping his hands on the pursestrings of \$45,000 of the proceeds."

In light of the allegations of the indictment and the totality of the proof presented at trial, the jury could reasonably have found that the fee splitting agreement was an integral part of the scheme and conduct in furtherance of the conspiracy charged. See *United States v. Mallah*, *supra*, 503 F.2d at 980.

D. Phone records showing calls to Weiner in Baltimore and the Russo letter were properly admitted into evidence

Among the phone calls reflected on the records from the House of Representatives (GX 91) were three calls to Weiner in Baltimore on May 28, June 12 and 20. Weiner testified on direct that he remembered having telephoned Frank Brasco about A.N.R. in May or June. He also testified that he frequently had been in Baltimore during the spring of 1968. (Tr. 1370, 1376). The trial court properly admitted into evidence the records reflecting these phone calls. Although there was no evidence that the Russo letter (GX 51) was ever mailed, it was properly introduced by the Government as an act of Weiner, who prepared it, in furtherance of the conspiracy. It also was admissible as a prior consistent statement by Weiner made before the existence of his alleged motive to testify falsely.

Weiner testified about conversations with Frank Brasco in which Brasco asked him to arrange a loan for Masiello even after the May 31, 1968 cancellation of the contract. The Russo letter, which Weiner prepared in June and which inquired about Brasco's "client's" intentions with regard to a loan was clearly evidence of an act in furtherance of the conspiracy. *United States v. Dorfman*, 470 F.2d 246, 248 (2d Cir.), *cert. dismissed*, 411 U.S. 923 (1973).

Weiner's testimony also had been impeached on the theory that he lied about being involved with Brasco in a loan since 1969 in order to save himself from prosecution.

The Russo letter which Weiner prepared to send to Brasco in June, 1968 is a statement by Weiner consistent with his trial testimony and antedating the circumstances which supplied the alleged motive to fabricate. See *DiCarlo v. United States*, 6 F.2d 364 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925); *United States v. Zito*, 467 F.2d 140, 1403-04 (2d Cir. 1972); *United States v. Dorfman*, *supra*, 470 F.2d at 248; see also *United States v. Alexander*, 430 F.2d 904 (D.C. Cir. 1970) and 4 Wigmore, *Evidence*, § 1132, p. 296. Furthermore, the trial judge gave a proper limiting instruction with regard to the testimony (Tr. 1545-48). *United States v. Zeehandelaar*, 498 F.2d 352, 357 (2d Cir. 1974); *United States v. Lipton*, 467 F.2d 1161, 1168 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); *United States v. DiLorenzo*, 429 F.2d 216, 220 (2d Cir.), *cert. denied*, 402 U.S. 950 (1970).

POINT VI

Appellant's claim that he was denied a fair trial because of references to the "Mafia", organized crime, Meade Esposito and armed Marshals guarding Masiello is frivolous.

Appellant claims that references in the Government's case to the "Mafia" and organized crime, to Meade Esposito and to the fact that marshals guarding Masiello were armed with shotguns were "irrelevant to the issues at hand." (Br. at 138). This argument ignores the record in this case. Each of these references was either probative of an element of proof in the Government's case or otherwise admissible as such. Furthermore, appellant completely fails to demonstrate how any of these references were so prejudicial as to require a new trial.

A. The references to the "Mafia" and organized crime

While appellant is correct that Masiello's criminal background was undisputed during the trial (Br. at 136), what he fails to note is that Frank Brasco's knowledge of that background was hotly in dispute. The indictment charged that Brasco assisted Masiello in obtaining truck leases after he (Brasco) had knowledge that the Post Office had cancelled one contract with Masiello's company, A.N.R., because he and others associated with A.N.R. had criminal records and backgrounds. (Indictment, ¶ 8(c), A. 14-15). When appellant complains that the prosecution read the contents of an FBI report regarding Masiello's background to the jury (Br. at 136), he completely ignores the fact that Timothy May read this material to the jury after he testified that these were the portions of a report that he (May) had read to Frank Brasco over the phone while explaining to the Congressman the reason for the Post Office decision to cancel A.N.R. (Tr. 631). Similarly, the other complained of references to the word "Mafia" arose when Doherty testified that he read a newspaper article to Brasco in November, 1967, which mentioned Masiello's "Mafia" connections, and Brasco replied, "those were old stories about Masiello of having ties to the Mafia." (Tr. 202) All of these references were clearly relevant to the Government's proof that Frank Brasco had knowledge of Masiello's criminal background not only after May told him on May 31, 1968, but before.* Furthermore, each reference to

* An additional reference to the "Mafia" occurred during Joseph Weiner's testimony when he said that Frank Brasco told him that Masiello was alleged to be associated with organized crime and the "Mafia". (Tr. 1331)

Likewise, the Government's use of newspaper articles about Masiello was proper to inquire into Frank Brasco's knowledge of Masiello's criminal background. See *United States v. Poindexter*, S.D.N.Y., 70 Cr. 897 (Cannella, J.—).

"Mafia" was testified to as the word actually used in a conversation between the witness and Frank Brasco. *United States v. Lazarus*, 425 F.2d 638 (9th Cir.), *cert. denied*, 400 U.S. 869 (1970), cited by appellant, supports the proposition that use of the word "Mafia" is not per se prejudicial and, in fact, is proper and admissible so long as it is "not wholly irrelevant." *Id.* at 641. See also *United States v. Polizzi*, 500 F.2d 856, 888 n. 54 (9th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3403 (1975) ("References to 'Mafia' and 'Italians' are certainly not per se prejudicial.") The use of the term "Mafia" in this case was unquestionably relevant and proper.

B. The references to Meade Esposito

The references to Meade Esposito in the Government's case were clearly admissible in connection with proving the nature and extent of the relationship between Frank Brasco and Joseph Weiner. (Tr. 1356). See *United States v. Dorfman*, *supra*, 470 F.2d at 249.* The argument that the introduction of Meade Esposito's name was an attempt by the prosecution to link Brasco to Watergate through a newspaper article which appeared before trial is unfounded and ridiculous. The article appeared in January 1974. Each of the trial jurors during the *voir dire* in June 1974 stated they saw no publicity linking Brasco to Watergate. (A. 53)

* Proof that Brasco referred Weiner to Esposito for the purpose of obtaining financing for non-A.N.R. transactions in May, 1968, a time contemporaneous with the Government's proof that Brasco was involved with Weiner and Doherty in obtaining a loan for A.N.R., was clearly relevant to show the kind of business relationship which existed between Weiner and Brasco.

C. References to marshals being armed with shotguns

The testimony about Masiello's being guarded by federal Marshals with shotguns came into the case in the first trial on re-direct of Masiello by the prosecutor. During cross examination defense counsel for both Joseph Brasco and Frank Brasco had asked questions suggesting preferred treatment of Masiello by the Government while he was out of prison in the custody of marshals. The District Court specifically permitted the Government to read the portion of re-direct having to do with the marshals having shotguns in order to allow the Government to show that the circumstances of Masiello's custody were essentially no different than any other prisoner guarded by armed marshals. (Tr. 1748, 1782-97).

Where the defense seeks to establish bias on the part of a prosecution witness in favor of the Government, it is perfectly permissible to present explanatory evidence in order to correct any misleading impression developed on cross-examination concerning the character of such bias. *Bracey v. United States*, 142 F.2d 85, 89 (D.C. Cir.), *cert. denied*, 322 U.S. 762 (1944); see *United States v. Rosson*, 441 F.2d 242, 244 (5th Cir.), *cert. denied*, 404 U.S. 843 (1971). This is precisely what the Government was permitted to do here.

In ruling on evidentiary matters, the trial judge must balance the probative value of the testimony against potential prejudice, and his exercise of discretion should not be disturbed on appeal except for grave abuse. *United States v. Wright*, 489 F.2d 1181 (D.C. Cir. 1973). No abuse has been shown here.

Brasco received the fair trial to which he was entitled.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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